TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1916

No. [redacted] 222

THE MISSOURI PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

McGREW COAL COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED AUGUST 28, 1916.

(24,884)

(24,884)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 601.

THE MISSOURI PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

McGREW COAL COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

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1 Which said Præcipe is in words and figures as follows, to-wit;

In the Supreme Court of the State of Missouri, April Term, 1915.

No. 17317.

McGrew Coal Company, Respondent,
vs.
The Missouri Pacific Railway Company, Appellant.

Præcipe for Record.

To Hon. J. D. Allen, Clerk of the Supreme Court of Missouri:

In obedience to the command of the writ of error issued in said cause from the Supreme Court of the United States to the Supreme Court of the State of Missouri, on July 19th, 1915, you will please send to the Supreme Court of the United States, as commanded in said writ, the following record of the entries, proceedings and matters in said cause, to-wit:

(1). Said writ of error.

(2). Your return to same.

(3). The citation issued in said cause.

(4). Acknowledgment of service thereon by the attorneys for defendant in error, McGrew Coal Company.

(5). Record entry of your court showing the filing and date of filing of the certified copy of judgment in said cause entered by the Circuit Court of Lafayette County, Missouri, together with the filing and date of filing of the order of said Circuit Court granting an appeal in said cause from said Circuit Court to the Supreme Court of the State of Missouri.

(6). The certified copy of said judgment and order granting appeal.

(7). The complete abstract of the record filed in said cause.

(8). The order of the Supreme Court of Missouri showing the submission of said cause to said Supreme Court.

(9). The judgment and opinion of the Supreme Court of Missouri En Banc, through Blair, Judge.

(10). Order of the Supreme Court of Missouri filing appellant's motion for rehearing of the said cause.

2 (11). The said motion for rehearing.

(12). Order of the Supreme Court of Missouri overruling said motion for rehearing.

(13). Copy of opinion of the Supreme Court of Missouri In Banc in McGrew v. The Missouri Pacific Railway Company, 258 Mo., p. 23.

(14). Copy of opinion of the Supreme Court of Missouri In Banc

in McGrew v. The Missouri Pacific Railway Company, 230 Mo., p. 496.

(15). Order of the Supreme Court showing presentation to the Honorable Jas. T. Blair, acting Chief Justice of the Supreme Court of the State of Missouri, of the following matters in said cause, to-wit: a petition for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Missouri, together with an assignment of errors committed by said Missouri Supreme Court, a citation directed to the Respondent (Defendant in Error) citing it to appear at the Supreme Court of the United States in not exceeding thirty days from the date of the citation; also Appellant's (plaintiff's in Error) bond in the sum of — Dollars, and showing the filing of said petition and assignment of errors, the allowance of said writ of error, the signing of said citation and the approval and filing of said bond.

(16). The said petition for writ of error in said cause.

(17). The said assignment of errors in said cause.

(18). The said bond in said cause.

Very respectfully yours,

THE MISSOURI PACIFIC RAILWAY COMPANY,
(*Appellant, Plaintiff in Error*),
By EDWARD J. WHITE,
HARVEY C. CLARK, AND
JAMES F. GREEN,
Its Attorneys.

Service of a true copy of the foregoing praecipe is hereby acknowledged, this 21st day of July, 1915.

ALEXANDER GRAVES,
Attorney for Respondent, (Defendant in Error).

2½ [Endorsed:] In the Supreme Court of Missouri, in banc. Case No. 17317. Room No. —. McGrew Coal Company, Respondent, vs. The Missouri Pacific Railway Company, Appellant. Praecipe for Record. Edw. J. White, H. C. Clark, and J. F. Green, for Appellant. Filed Jul- 19, 1915. J. D. Allen, clerk.

3 Which said writ of error is in words and figures as follows, to-wit;

In the Supreme Court of the State of Missouri, April Term, 1915.

No. 17317.

McGrew Coal Company, Respondent,
vs.
The Missouri Pacific Railway Company, Appellant.

United States of America, *ss*:

The President of the United States to the Judges of the Supreme Court of the State of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea in the cause of McGrew Coal Company, Respondent vs. The Missouri Pacific Railway Company, appellant, No. 17317, which is in the said Supreme Court before you (being the highest court of law or equity in said State wherein a decision could be had in said cause), at the April 1915 Term thereof, (final judgment having been rendered June 29, 1915, and appellant's motion for rehearing having been overruled July 12, 1915), a manifest error hath happened to the great damage of appellant, The Missouri Pacific Railway Company, as by its complaint appears;

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, distinctly and openly under your seal, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., not exceeding thirty days from and after the date of the citation in said cause, in the

4 said Supreme Court, to be then and there held; that the record and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, according to the laws and customs of the United States, should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this 19th day of July, A. D. 1915.

Issued at office in the City of Jefferson, with the Seal of the District Court of the United States for the Central Division of the Western District of Missouri, dated as aforesaid.

JOHN B. WARNER,
Clerk of the United States District Court, Western District of Missouri, Central Division,
By H. C. GEISBERG, *Deputy.*

]Seal of The United States District Court, Western District of Missouri, Central Division.[

Allowed by
JAMES T. BLAIR,
Acting Chief Justice of the Supreme Court of the State of Missouri.

4½ [Endorsed:] in the Supreme Court of Missouri, in banc. Case No. 17,317. Room No. —. McGrew Coal Company, Respondent, vs. The Missouri Pacific Railway Company, Appellant. Writ of Error. Edw. J. White, J. F. Green and H. C. Clark, for Appellant. Filed Jul- 19, 1915. J. D. Allen, clerk.

5 Which said Citation is in words and figures as follows, to-wit:

In the Supreme Court of the State of Missouri, April Term, 1915.

No. 17317.

McGrew Coal Company, Respondent,
vs.
The Missouri Pacific Railway Company, Appellant.

The United States of America to McGrew Coal Company, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at Washington, D. C., not exceeding thirty days from and after the day this citation bears date, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Missouri, wherein The Missouri Pacific Railway Company is Plaintiff in Error, and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, James T. Blair, Acting Chief Justice of the Supreme Court of Missouri, this 19th day of July, in the year of our Lord, One Thousand Nine Hundred and Fifteen.

JAMES T. BLAIR,
Acting Chief Justice.

United States of America,
Central Division of the Western District of Missouri, ss:

I hereby acknowledge service of the within Citation this 21st day of July, A. D. 1915.

ALEXANDER GRAVES,
Attorney for Defendant in Error.

5½ [Endorsed:] In the Supreme Court of Missouri, in banc. Case No. 17317. Room No. —. McGrew Coal Company, Respondent, vs. The Missouri Pacific Railway Company, Appellant. Citation. Edw. J. White, H. C. Clark, and J. F. Green, for Appellant. Filed July 23, 1915. J. D. Allen, Clerk, per M.

6 Be it remembered that on the 23rd day of September, 1912, there was filed in the office of the Clerk of the Supreme Court of Missouri a certified copy of the judgment and order granting an

appeal from the Circuit Court of Lafayette County, Missouri, in a certain cause in which the McGrew Coal Company was plaintiff-respondent and the Missouri Pacific Railway Company was defendant-appellant, which judgment and order granting an appeal are in words and figures as follows, to-wit:

STATE OF MISSOURI,
County of Lafayette, ss:

In the Circuit Court of Lafayette County, Missouri, at Lexington, June Term, 1st Day, June 10th, 1912.

MCGREW COAL COMPANY, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Now at this day come the parties hereto by their respective attorneys and this cause being called for final hearing and trial and a jury being waived by consent of parties to be tried by the court without the intervention of a jury and the court having examined the pleadings and heard the evidence, including the stipulation of facts between the parties as follows, to-wit:

7 "In the Circuit Court of Lafayette County, Missouri, June Term, 1912.

MCGREW COAL COMPANY, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

It is hereby stipulated between the parties that the defendant's stations, the rates charged by the defendant, including those paid by the plaintiff, the amount of coal transported and the distance set out in the several counts of the petition are correctly stated therein.

It is further stipulated that such coal was delivered by the plaintiff to the defendant for shipment in the usual and ordinary way without any direction or request by plaintiff as to what particular trains the same was to be transported in and that the defendant received and transported the same in the usual and ordinary course of Business, on the usual trains passing over its road. It is further agreed that the trains in which the defendant hauled said cars of coal contained other cars and shipments consigned from points within this state to points without the same, from points without the same to points within this state and from points without this state through this state and to points in other states.

ALEXANDER GRAVES,
Attorney for Plaintiff.

H. C. CLARK,
Attorney for Defendant."

8 And all and singular the facts being heard and seen and the court being fully advised in the premises, doth find the issue for the plaintiff.

It is therefore considered and adjudged by the court that the plaintiff herein have and recover of the defendant upon the following counts of said petition for the following amounts, to-wit:

The court doth find the issue for the plaintiff upon the first count of the petition and assess its damage at the sum of $130.05.

It is therefore ordered and adjudged by the court that plaintiff have and recover judgment against defendant upon said first count for the sum of $130.05.

The court doth find the issue for the plaintiff upon the second count of the petition and assess its damage at the sum of $51.00.

It is therefore ordered and adjudged by the court that plaintiff have and recover judgment against defendant upon said second count for the sum of $51.00.

The court doth find the issue for the plaintiff upon the third count of the petition and assess its damage at the sum of $256.50.

It is therefore ordered and adjudged by the court that plaintiff have and recover judgment against defendant upon said third count for the sum of $256.50.

9 The court doth find the issue for the plaintiff upon the fourth count of the petition and assess its damage at the sum of -67.27.

It is therefore ordered and adjudged by the court that plaintiff have and recover judgment against defendant upon said fourth count for the sum of $67.27.

The court doth find the issue for the plaintiff upon the fifth — of the petition and assess its damage at the sum of $103.18.

It is therefore ordered and adjudged by the court that plaintiff have and recover judgment against defendant upon said fifth count for the sum of $103.18.

The court doth find the issue for the plaintiff upon the sixth count of the petition and assess its damage at the sum of $3.18.

It is therefore ordered and adjudged by the court that the plaintiff have and recover judgment against defendant upon said sixth count for the sum of $3.18.

The court doth find the issue for the plaintiff upon the seventh count of the petition and assess its damage at the sum of $122.05.

It is therefore ordered and adjudged by the court that the plaintiff have and recover judgment against defendant upon said seventh count for the sum of $122.05.

10 The court doth find the issue for the plaintiff upon the eighth count of the petition and assess its damage at the sum of $84.65.

It is therefore ordered and adjudged by the court that the plaintiff have and recover judgment against defendant upon said eighth count for the sum of $84.65.

The court doth find the issue for the plaintiff upon the ninth count of the petition and assess its damage at the sum of $108.63.

It is therefore ordered and adjudged by the court that the plaintiff have and recover judgment against defendant upon said ninth count for the sum of $108.63.

The court doth find the issue for the plaintiff upon the tenth count of the petition and assess its damage at the sum of $46.20.

It is therefore ordered and adjudged by the court that the plaintiff have and recover judgment against defendant upon said tenth count for the sum of $46.20.

The court doth — the issue for the plain- upon the eleventh count of the petition and assess its damage at the sum of $47.78.

It is therefore ordered and adjudged by the court that the plaintiff have and recover judgment against defendant upon said eleventh count for the sum of $47.78.

The court doth find the issue for the plaintiff upon the twelfth count of the petition and assess its damage at the sum of $30.10.

It is therefore ordered and adjudged by the court that the
11 plaintiff have and recover judgment against defendant upon said twelfth count for the sum of $30.10.

The court doth find the issue for the plaintiff upon the thirteenth count of the petition and assess its damages at the sum of $183.21.

It is therefore ordered and adjudged by the court that the plaintiff have and recover judgment against defendant upon said thirteenth count for the sum of $183.21.

The court doth find the issue for the plaintiff upon the fourteenth count of the petition and assess its damage at the sum of $10.04.

It is therefore ordered and adjudged by the court that the plaintiff have and recover judgment against defendant upon said fourteenth count for the sum of $10.04.

The court doth find the issue for the plaintiff upon the fifteenth count of the petition and assess its dam- at the sum of $350.00.

It is therefore ordered and adjudged by the court that the plaintiff have and recover judgment against defendant upon said fifteenth count for the sum of $350.00.

The court doth find the issue for the plaintiff upon the sixteenth count of the petition and assess its damage at the sum of $10.26.

It is therefore ordered and adjudged by the court that the plaintiff have and recover judgment against defendant upon said six-
12 teenth count for the sum of $10.26.

The court doth find the issue for the plaintiff upon the seventeenth count of the petition and assess its damage at the sum of $70.22.

It is therefore ordered and adjudged by the court that the plaintiff have and recover judgment against Defendant upon said seventeenth count for the sum of $70.22.

The court doth find the issue for the plaintiff upon the eighteenth count of the petition and assess its damage at the sum of $115.15.

It is therefore ordered and adjudged by the court that the plaintiff have and recover judgment against defendant upon said eighteenth count for the sum of $115.15.

The court doth find the issue for the plaintiff upon the nineteenth count of the petition and assess its damage at the sum of $9.24.

It is therefore ordered and adjudged by the court that the plaintiff have and recover judgment against defendant upon said nineteenth count for the sum of $9.24.

The court doth find the issue for the plaintiff upon the twentieth count of the petition and assess its damage at the sum of $28.18.

It is therefore ordered and adjudged by the court that the plaintiff have and recover judgment against defendant upon said twentieth count for the sum of $28.18.

13 The court doth find the issue for the plaintiff upon the twenty first count of the petition and assess its damage at the sum of $13.07.

It is therefore ordered and adjudged by the court that the plaintiff have and recover judgment against defendant upon said twenty first count for the sum of $13.07.

The court doth find the issue for the plaintiff upon the twenty second count of the petition and assess the damage at the sum of $22.76.

It is therefore ordered and adjudged by the court that the plaintiff have and recover judgment against defendant upon said twenty second count for the sum of $22.76.

The court doth find the issue for the plaintiff upon the twenty third count of the petition and assess its damage at the sum of $8.10

It is therefore ordered and adjudged by the court that the plaintiff have and recover judgment against defendant upon said twenty third count for the sum of $8.10.

The court doth find the issue for the plaintiff upon the twenty fourth count of the petition and assess its damage at the sum of $22.50.

It is therefore ordered and adjudged by the court *the* the plaintiff have and recover judgment against defendant upon said twenty fourth count for the sum of $22.50.

14 The court doth find the issue for the plaintiff upon the twenty fifth count of the petition and assess its damage at the sum of $38.23.

It is therefore ordered and adjudged by the court that the plaintiff have and recover judgment against defendant upon said twenty fifth count for the sum of $38.23.

The court doth find the issue for the plaintiff upon the twenty sixth count of the petition and assess its damage at the sum of $38.83.

It is therefore ordered and adjudged by the court that the plaintiff have and recover judgment against defendant upon said twenty sixth count for the sum of $38.83.

The court doth find the issue for the plaintiff upon the twenty seventh count of the petition and assess its damage at the sum of $52.13.

It is therefore ordered and adjudged by the court that the plaintiff have and recover judgment against defendant upon said twenty seventh count for the sum of $52.13.

The court doth find the issue for the plaintiff upon the twenty

eighth count of the petition and assess its damage at the sum of $17.08.

It is therefore ordered and adjudged by the court that the plaintiff have and recover judgment against defendant upon said
15 twenty eight- count for the sum of $17.08.

The court doth find the issue for the plaintiff upon the twenty ninth count of the petition and assess its damage at the sum of $17.61

It is therefore ordered and adjudged by the court that the plaintiff have and recover judgment against defendant upon said twenty ninth count for the sum of $17.61.

The court doth find the issue for the plaintiff upon the thirtieth count of the petition and assess its damage at the sum of $6.87.

It is therefore ordered and adjudged by the court that the plaintiff have and recover judgment against defendant upon said thirtieth count for the sum of $6.87.

The court doth find the issue for the plaintiff upon the thirty first count of the petition and assess its damage at the sum of $15.77.

It is therefore ordered and adjudged by the court that the plaintiff have and recover judgment against defendant upon said thirty first count for the sum of $15.77.

The court doth find the issue for the plaintiff upon the thirty second count of the petition and assess its damage at the sum of $60.13.

16 It is therefore ordered and adjudged by the court that the plaintiff have and recover judgment against defendant upon said thirty second count for the sum of $60.13.

The court doth find the issue for the plaintiff upon the thirty third count of the petition and assess its damage at the sum of $172.50.

It is therefore ordered and adjudged by the court that the plaintiff have and recover judgment against defendant upon said thirty third count for the sum of $172.50.

The court doth find the issue for the plaintiff upon the thirty fourth count of the petition and assess its damage at the sum of $4.85.

It is therefore ordered and adjudged by the court that the plaintiff have and recover judgment against defendant upon said thirty fourth count for the sum of $4.85.

The court doth find the issue for the plaintiff upon the thirty fifth count of the petition and assess its damage at the sum of $115.98.

It is therefore ordered and adjudged by the court that the plaintiff have and recover judgment against defendant upon said thirty fifth count for the sum of $115.98.

17 The court doth find the issue for the plaintiff upon the thirty sixth count of the petition and assess its damage at the sum of $29.88.

It is therefore ordered and adjudged by the court that the plaintiff have and recover judgment against defendant upon said thirty sixth count for the sum of $29.88.

The court doth find the issue for the plaintiff upon the thirty seventh count of the petition and assess its damage at the sum of $12.11.

It is therefore ordered and adjudged by the court that the plaintiff have and recover judgment against defendant upon said thirty seventh count for the sum of $12.11.

The court doth find the issue for the plaintiff upon the thirty eighth count of the petition and assess its damage at the sum of $103.68.

It is therefore ordered and adjudged by the court that the plaintiff have and recover judgment against defendant upon said thirty eighth count for the sum of $103.68.

The court doth find the issue for the plaintiff upon the thirty ninth count of the petition and assess its damage at the sum of $375.59.

It is therefore ordered and adjudged by the court that the plaintiff have and recover judgment against defendant upon said thirty ninth count for the sum of $375.59.

18 The court doth find the issue for the plaintiff upon the fortieth count of the petition and assess its damage at the sum of $158.55.

It is therefore ordered and adjudged by the court that the plaintiff have and recover judgment against defendant upon said fortieth count for the sum of $158.55.

The court finds the issue for the plaintiff upon the forty first count of the petition and assess its damage at the sum of $157.79.

It is therefore ordered and adjudged by the court that plaintiff have and recover judgment against defendant upon said forty first count for the sum of $157.79.

The court finds the issue for the plaintiff upon the forty second count of the petition and assess its damage at the sum of $1,044.99.

It is therefore ordered and adjudged by the court that plaintiff have and recover judgment against defendant upon said forty second count for the sum of $1,044.99.

The court doth find the issue for the plaintiff upon the forty third count of the petition and assess its damage at the sum of $164.11.

It is therefore ordered and adjudged by the court that plaintiff have and recover judgment against defendant upon said forty third count for the sum of $164.11.

The court doth find the issue for the plaintiff upon the forty fourth count of the petition and assess its damage at the

19 sum of $970.22.

It is therefore ordered and adjudged by the court that plaintiff have and recover of the defendant judgment against defendant upon said forty fourth count for the sum of $970.22.

The court doth find the issue for the plaintiff upon the forty fifth count of the petition and assess its damage at the sum of $2,032.99.

It is therefore ordered and adjudged by the court that plaintiff

have and recover judgment against defendant upon said forty fifth count for the sum of $2,032.99.

The court dith find the issue for the plaintiff upon the forty sixth count of the petition and assess its damage at the sum of $4,317.00.

It is therefore ordered and adjudged by the court that plaintiff have and recover judgment against defendant upon said forty sixth count for the sum of $4,317.00.

The court doth find the issue for the plaintiff upon the forty seventh count of the petition and assess its damage at the sum of $4,703.98.

It is therefore ordered and adjudged by the court that plaintiff have and recover judgment against defendant upon said forty seventy count for the sum of $4,703.98.

Aggregating upon all the counts the sum of $16,504.19.

20 It is therefore ordered and adjudged by the court that the plaintiff herein have and recover of the defendant judgment herein for said total sum of $16,504.19, and judgment for its costs herein and that it have execution therefor.

To which action and judgment of the court in rendering judgment on each and every one of the 47 counts of said petition, the defendant at the time objected and excepted.

In the Circuit Court of Lafayette County, Missouri, at Lexington, June Term, 9th day, June 19th, 1912.

McGrew Coal Company, Plaintiff,
vs.
The Missouri Pacific Railway Company, Defendant.

Now at this day comes the defendant herein by its attorneys and files its affidavit for an appeal of this cause and deposits with the Clerk of this court the sum of Ten Dollars ($10.00) docket fee for the appellate court and said affidavit for appeal being taken up and submitted to the court and being duly examined and approved and found sufficient and in due form, an appeal of said cause is allowed the defendant and granted by the court to the Supreme Court of the State of Missouri.

21 And leave is given the defendant to file an appeal bond in the sum of Thirty Three Thousand Dollars ($33000.00) within ten days after the adiournment of this term of the court, said appeal bond to be approved by the clerk of this court. And leave is also given the defendant to file its bill of exceptions herein on or before October 15th 1912.

State of Missouri,
County of Lafayette, ss:

I, J. W. Sydnor, Clerk of tthe Circuit Court within and for Lafayette County Missouri hereby certify that the above and foregoing is a full, true and complete copy of the original judgment and order

allowing appeal in the above entitled cause as fully as the same appears of record and on file in my office.

Witness my hand and the seal of said court at office in Lexington, Missouri this the 19th day of September 1912.

[SEAL.] J. W. SYDNOR,
Clerk Circuit Court.

22 And thereafter, to-wit, on the 26th day of March, 1915, there was filed by appellant an abstract of the record in said cause, which abstract of record is in words and figures as follows:

In the Supreme Court of Missouri, Division No. 1, April Term, 1915.

No. 17313.

McGREW COAL CO. (Plaintiff), Respondent,
vs.
THE MISSOURI PACIFIC RAILWAY CO. (Defendant), Appellant.

Appellant's Abstract of the Record.

Petition.

The petition filed in the Circuit Court of Lafayette County, Missouri, returnable to the February Term, 1912, contains forty-seven counts. Each count is based upon alleged illegal charges on shipment of coal from Myrick, Missouri, to some other station on the line of defendant's railroad in the State of Missouri. All the counts are identical except as to dates, amount of coal shipped, the rate charged, the destination and the comparative rate charged by the defendant for shipment between points given. To save encumbering this abstract and for convenience these counts will be classified and one count in each class set out in full.

23 Class A.

The counts in this class cover shipments from Myrick, Missouri, to the points named below. Comparison is made in each of these with the 50 cent rate charged by defendant on shipments from Liberal, Missouri, to Granby, Missouri.

Count.	Destination of shipment.	Line.
1	Strasburg	Main Line
2	Otterville	" "
3	Pleasant Hill	" "
4	Nelson	River Route
6	Marshall	" "
8	Higginsville	Lexington Branch
9	Greenwood	Main Line
10	Grand Pass	River Route

13	Dresden	Main Line
15	Kingsville	" "
17	Cole Camp	Lexington Branch
18	Naptonville	River Branch
27	Mora	Lexington Branch
32	Georgetown	Lexington Branch
36	Blackwater	River Route
39	Summit	Main Line
42	Holden	" "
44	Lee's Summit	" "
45	Booneville	Booneville Branch
46	Sedalia	Main Line

24 The first count, which is identical with all the other above mentioned counts except in the particulars stated is as follows:

STATE OF MISSOURI,
County of Lafayette, ss:

McGREW COAL CO., Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

In the Circuit Court, Lafayette County, Missouri, February term, 1912, at Lexington, Missouri.

"Plaintiff avers that on April, 1908 it was and still is a coal mining company incorporated under the law of *of* the State of Missouri.

"Plaintiff for 1st cause of action avers that on October, 1879, the defendant was and has been ever since a railroad corporation duly organized under the law of said state and a common carrier for hire of freight and passengers between its stations hereinafter named in said state.

"That within five years last past and on the dates hereinafter named plaintiff produced and sold bituminous coal from its own mines near Myrick, one of defendant's stations in said county, and that on the various dates named in exhibit No. 1 and in the cars therein described by number and initial, it shipped by defendant's road from said Myrick in the aggregate 867,000 pounds of
25 its said coal in car load lots to the consignee named in said exhibit at Strasburg, Mo., another station on defendant's road.

"Plaintiff avers that for the said carriage of said coal defendant fixed, charged and demanded and received of the plaintiff 80 cents per ton, an illegal freight rate, being 30 cents per ton more than defendant was by law entitled to fix, demand, charge and receive, in this, that during all said times and dates herein named defendant had fixed, charged, demanded and received for the carriage for the same class of coal over its said line and over another part of said road from its station of Liberal, Mo. and to another of its said stations, viz., Granby in said State, a distance of 77.14 miles, 50 cents per ton by the car load while the distance from said Myrick to said Strasburg

was only 61.95 miles for which said rate of 80 cents per ton for said carriage fixed, charged, demanded and received of plaintiff as aforesaid; and the same was illegal and exceeded the amount the defendant was entitled to fix, charge, demand and receive for said shipments by the sum of $130 and 5 cents.

"And the plaintiff avers that it is damaged and aggrieved by reason of said illegal freight charge in the sum of $130 and 5 cents; wherefore it prays judgment for the same and for damages
26 not exceeding $1000.00 and for all other and general relief, according to the statutes in such case made and provided.

ALEXANDER GRAVES,
Attorney for Plaintiff.

Class B.

The counts in this class cover shipments from Myrick, Missouri, to the points named below. Comparison is made in each of these counts with the 30 cent rate charged by defendant on shipments from Worland, Mo. to Horton, Mo.

The 11th count, which is identical with the other above mentioned counts except in the particulars stated, is as follows:

Count.	Destination of shipment.	Line.
11	Grand Pass	River Route
26	Levasy	Lexington Branch
34	Buckner	" "
35	Higginsville	" "
37	Aullville	" "
38	Concordia	" "

"Plaintiff for 11th cause of action avers that on October 1879, the defendant was and has ever since been a railroad corporation duly organized under the law of said state and a common carrier for hire of freight and passengers between its stations hereinafter named in said state."

27 "That within five years last past and on the dates hereinafter named, plaintiff produced and sold bituminous coal from his own mines near Myrick, one of defendant's stations in said county, and that on the various dates named in exhibit No. 11, and in the cars therein described by number and initial it shipped by defendant's road from said Myrick in the aggregate 382,300 pounds of its said coal in car load lots to the consignees named in said exhibit at Grand Pass, Mo., another station on defendant's road.

"Plaintiff avers that for the said carriage of said coal defendant fixed, charged, demanded and received of the plaintiff 55 cents per ton, an illegal freight rate, being 25 cents per ton more than defendant was by law entitled to fix, demand, charge and receive, in this, that during all said time and dates herein named defendant had fixed, charged, demanded and received for carriage of the same class of coal over its said line and over another part of its said road from its station of Worland and to another of its said stations, viz., Horton

in said state, a distance of 31.04 miles, 30 cents per ton by the car load while the distance from the said Myrick to said Grand Pass was only 27.62 miles, for which said rate of 55 cents per ton for said carriage was fixed, charged, demanded and received of plaintiff as aforesaid; and the same was illegal and exceeded the amount
28 the defendant was entitled to fix, charge, demand and receive for said shipments by the sum of $47 and 78 cents.

"And the plaintiff avers that he is damaged and aggrieved by reason of said illegal freight charge in the sum of $47 and 78 cents; wherefore he prays judgment for the same and for damages not exceeding $1000.00 and for all other and general relief, according to the statute in such case made and provided."

Class C.

The counts in this class cover shipments from Myrick, Mo., to the points named below. Comparison is made in each of these with the 40 cent rate charged by defendant on shipments from Worland, Mo., to Nassau Junction, Mo.

Count.	Destination of shipment.	Line.
33	Blosser	River Route

The 33rd count, which is identical with the above named counts except in the particulars stated, is as follows:

"Plaintiff for 33rd cause of action avers that on October, 1879, the defendant was and has ever since been a railroad corporation duly organized under the law of said state and a common carrier for hire of freight and passengers between its stations hereinafter named in said state.

29 "That within five years past and on the dates hereinafter named, plaintiff produced and sold bituminous coal from its own mines near Myrick, Mo., one of defendant's stations in said county, and that on the various dates named in exhibit No. 33 and in the cars therein described by number and initial he shipped by defendant's road from said Myrick in the aggregate 2,300,000 pounds of its coal in car lots to the consignees named in said exhibit at Blosser, another station on defendant's road. Plaintiff avers that for the said carriage of said coal defendant, fixed, charged, demanded and received of the plaintiff 55 cents per ton, an illegal freight rate, being 15 cents per ton more than defendant was by law entitled to fix, demand, charge and receive, in this, that during all said times and dates herein named defendant had fixed, charged, demanded and received for the carriage of the same class of coal over its said line and over another part of its said road from its station of Worland and to another of its said stations, viz. Nassau Junction, in said state, a distance of 42.99 miles, 40 cents per ton by the car load, while the distance from said Myrick to said Blosser was only 36.20 miles, for which said rate of 55 cents per ton for said carriage was fixed, charged, demanded and received of plaintiff as aforesaid; and the same was illegal and exceeded the amount defendant was entitled to fix, charge,

demand and receive for said shipment by the sum of $172 and 50 cents.

30 "And the plaintiff avers that it is damaged and aggrieved by reason of said illegal freight charge in the sum of $172 and 50 cents; wherefore he prays judgment for the same and for damages not exceeding $1000 and for all other and general relief, according to the statutes in such cases made and provided.

Class D.

The counts in this class cover shipments from Myrick, Mo., to the points named below. Comparison is made in each of these counts with the 80 cent rate charged by defendant on shipments from Myrick, Mo., to Jefferson City, Mo.

Count.	Destination of shipment.	Line.
16	California	Main Line
20	Lincoln	River Route
21	Fortuna	Lexington Branch
22	Warsaw	" "
24	Syracuse	Main Line
25	Butler	Joplin Branch
28	Bunceton	Booneville Branch
29	Sandy Hook	" "
30	Overton	River Route
31	Lepus	" "
40	Tipton	Main Line
41	Centerview	" "
43	Warrensburg	" "

31 The 16th count which is identical with the other above mentioned counts except in the particulars stated, is as follows:

"Plaintiff for the 16th cause of actions avers that on October — 1879, the defendant was and has ever since been a railroad corporation duly organized under the law of said state and a common carrier for hire of freight and passengers between its stations hereinafter named in said state.

That within five years last past and on the dates hereinafter named, plaintiff produced and sold bituminous coal from its own mines near Myrick, one of defendant's stations in said county, and that on the various dates named in exhibit No. 16 and in the cars therein described by number and initial he shipped by defendant's road from said Myrick in the aggregate 102,600 pounds of its said coal in car load lots to the consignees named in said exhibit at California, another station on defendant's road.

"Plaintiff avers that for the carriage of said coal defendant fixed, charged, demanded and received of the plaintiff 100 cents per ton, an illegal freight rate, being 20 cents per ton more than defendant was by law entitled to fix, charge, demand and receive, in this, that during all said times and dates herein named defendant had fixed, charged, demanded and received for the carriage of the same class of

32 coal over its said line and over another part of its said road from its station of Myrick and to another of its said stations,

z. Jefferson City, in said state, a distance of 120.31 miles, 80 cents er ton by the car load, while the distance from said Myrick to said alifornia was only 95.21 miles, for which said rate of 100 cents per n for said carriage was fixed, charged, demanded and received of laintiff as aforesaid; and the same was illegal and exceeded the mount the defendant was entitled to fix, charge, demand and receive or said shipment by the sum of $10 and 26 cents.

"And the plaintiff avers that it is damaged and aggrieved by reason f said illegal freight charge in the sum of $10.26; wherefore it prays udgment for the same and for damages not exceeding $1000.00 and or all other and general relief, according to the statutes in such cases nade and provided."

Class E.

The counts in this class cover shipments from Myrick, Mo., to the points named below. Comparison is made in each of these with the 40 cent rate charged by defendant on shipments from Wor-
33 land, Mo., to Nevada, Mo.

Count.	Destination of shipment.	Line.
5	Malta Bend	River Route
7	Independence	Main Line
12	Sweet Springs	Lexington Branch
14	Stanhope	River Route
19	Concordia	Lexington Branch
23	Emma	" "
47	Kansas City	Main Line
85	Sugar Creek	" "
91	Conordia	Lexington Branch
104	Grand Pass	River Route

The 5th count, which is identical with the other above mentioned counts except in the particulars stated, is as follows:

"Plaintiff for 5th cause of action avers that in October, 1879, the defendant was and has ever since been a railroad corporation duly organized under the law of said state and a common carrier for hire of freight and passengers between its stations hereinafter named in said state.

"That within five years last past, and on the dates hereinafter named, plaintiff produced and sold bituminous coal from its own mines near Myrick, one of defendant's stations in said county, and that on the various dates named in exhibit No. 5 and in the
34 cars therein described by number and initial he shipped by defendant's road from said Myrick in the aggregate 1,375,800 pounds of its said coal in car load lots to the consignees named in said exhibit at Malta Bend, another station on defendant's road.

"Plaintiff avers that for the said carriage of said coal defendant fixed, charged, demanded and received of the plaintiff 55 cents per ton, an illegal freight rate, being 15 cents per ton more than defendant was by law entitled to fix, demand, charge and receive, in this, that during all said times and

dates herein named defendant had fixed, charged, demanded and received for the carriage of the same class of coal over its said line and over another part if its said road from its station of Worland and to another of its said stations, viz., Nevada, in said state, a distance of 41.07 miles, 40 cents per ton by the car load, while the distance from said Myrick to said Malta Bend was only 32.26 miles, for which said rate of 55 cents per ton for said carriage was fixed charged, demanded and received of plaintiff as aforesaid; and the same was illegal and exceeded the amount the defendant was entitled to fix, charge, demand and receive for said shipment by the sum of $103.18.

"And the plaintiff avers that it is damaged and aggrieved by reason of said illegal freight charge in the sum of $103.18. Wherefore it prays judgment for the same and for damages not
35 exceeding $1000.00 and for all other and general relief according to the statute in such cases made and provided."

Answer.

On the first day of the February term 1912, the defendant was given leave to plead to the petition on or before April 15, 1912, and on April 12, 1912, and within the time so allowed by the court an answer was filed to said petition. The answer to each of the counts of the petition is identical, and that made to the first count only is here printed. This answer, omitting formal parts is as follows:

"Comes now the defendant and for its answer to the 1st count of plaintiff's petition, states that the same is founded upon the Session Laws of Missouri, 1872, page 69, now Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, and section 12 of Article 12 of the Constitution of Missouri, 1875, and that said sections are null and void and of no legal force and effect for the following reasons:

(*a*). Because said sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, when enacted by the Legislature were passed in violation of Section 32 of Article 4 of the Constitution of Missouri 1865, in this: that the title of said Act of 1872, now Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, purport
36 to prevent unjust discrimination in freight rates, whereas the body of said Act prohibits discrimination of all kinds without regard to whether the same is unjust or just and reasonable and the subject of said act is not therefore expressed in its title.

(*b*). Because said Sections 3173 and 3211 are repugnant to and in violation of Section 14 of Article 12 of the Constitution of Missouri, 1875, in this: that said section of the Constitution provided for the passage of laws to correct abuses and prevent unjust discrimination and extortions in freight and passenger rates, and establishing reasonable maximum freight rates, whereas the body of said Act of 1872, now sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, prohibits discrimination of all kinds with

out regard to whether the same is unjust or just and reasonable and fixes arbitrary, unfair and unreasonable maximum rates.

(c). Because said Sections 3173 and 3211 Revised Statutes of Missouri, 1909, when re-enacted by the Legislature in 1879, were not legally re-enacted but were enacted in violation of Section 28 of Article 4 of the Constitution of Missouri, 1875, in this: that the title of said Act as passed makes the same appear to be an Act to prevent unjust discrimination, whereas, the body of said Act prohibits discrimination of all kinds without regard to whether the rates fixed are unjust or just and reasonable, and the subject of said Act is not therefore clearly expressed in its title.

37 (d). Because said Sections 3173 and 3211 of the Revised Statutes of Missouri 1909, were repealed by an Act of the Legislature passed in 1887 entitled, "An Act to Regulate Railroad Corporations," passed at the extra session of 1887, same being found in the Session Laws of 1887 at page 15, now Sections 3185 and 3193 of the Revised Statutes, 1909.

For further answer to said count, the defendant says that Section 12 of Article 12 of the Constitution of Missouri, 1875, and Sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Missouri, 1909, are in violation of Section 1 of Article 14 of the Amendments to the Constitution of the United States in this: that said Sections of the Constitution of Missouri and of the Revised Statues of Missouri, deprive defendant of its property without due process of law and denies to it the equal protection of the laws.

"For further answer to said count, the defendant says that Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, are repugnant to and in violation of Article 5 of the Amendments to the Constitution of the United States in this: That said Sections deprive the defendant of its property without due process of law.

"For further answer to said count the defendant says that Sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Missouri, 1909, and Section 12 of Article 12 of the Constitution of Missouri, 1875, are in conflict with Section 8 of

38 Article 1 of the Constitution of the United States and the various laws passed by Congress thereunder in this: That the said defendant is engaged in interstate commerce and owns and operates various lines of railroad as a part of its system which run into other states than Missouri and into the states of Kansas, Colorado, Nebraska, Oklahoma, Illinois, Arkansas and Louisiana, and that the train in which the plaintiff's property described in said count was being transported was at the time engaged in interstate commerce and contained car load lots and shipments of merchandise consigned and being carried from points without the State of Missouri to points within this state, and from points within this state to points without the same and from points without this state across the state of Missouri and to points in other states, and that by reason of the premises this state is without jurisdiction to adopt and pass the sections herein named and to enforce the provisions of the same against this defendant while so engaged in interstate commerce.

"For further answer to said count, the defendant says that Sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Missouri, 1909, and Section 12 of Article 12 of the Constitution of Missouri, 1875, are in conflict with Section 8 of Article 1 of the Constitution of the United States and the various laws passed by Congress thereunder in this: that the defendant's railroad is
39 an interstate road and its lines extend over and through the States of Missouri, Kansas, Colorado, Nebraska, Illinois, Oklahoma, Arkansas and Louisiana, and that it is engaged in interstate commerce over its said lines through all of said states and operates trains over the same in transporting freight and passengers through said States; that said section of the Constitution of Missouri and Sections of the Revised Statutes seek to compel the defendant arbitrarily to fix its rates in this State and in all of said States and in comparison with rates existing in all such States without regard to the laws passed by Congress regulating interstate commerce.

"For further answer to said count the defendant denies each and every allegation therein contained.

"Wherefore having fully answered defendant prays to go hence with its costs."

R. T. RAILEY,
L. L. SCOTT,
H. C. CLARK,
Attorneys for Defendant.

Stipulation as to Facts.

On the first day of the June term 1912, the following stipulation as to the facts was filed, which said stipulation omitting formal parts is as follows:

"It is hereby stipulated between the parties that the defendant's stations, the rates charged by the defendant, including those
40 paid by the plaintiff, the amount of coal transported and the distance set out in the several counts of the petition are correctly stated therein. It is further stipulated that such coal was delivered by the plaintiff to the defendant for shipment in the usual and ordinary way without any direction or request by plaintiff as to what particular trains the same was to be transported in and that the defendant received and transported the same in the usual and ordinary course of business, on the usual trains passing over its road.

"It is further agreed that the trains in which the defendant hauled said cars of coal contained other cars and shipments consigned from points within this state to points without the same, from points without the same to points within this state and from points without this state through this state and to points in other states.

ALEXANDER GRAVES,
Attorney for Plaintiff.
L. L. SCOTT,
H. C. CLARK,
Attorneys for Defendant.

Motion to Strike Out Parts of Defendant's Answer.

On the first day of the June 1912 term of the court, plaintiff filed the following motion to strike out portions of the defendant's answer which said motion omitting formal parts is as follows:

41 "Comes now the plaintiff, McGrew Coal Company, and moves the court to strike out the following parts and portions of the defendant's amended answer, to-wit, all the special defenses pleaded therein to each of the counts in plaintiff's petition numbered from 1 to 47, inclusive, each of said special pleas being, substantially, in words and figures, following, to-wit:"

Comes now the defendant and for its answer to the — count of plaintiff's petition, states that the same is founded upon the Session Laws of Missouri, 1872, page 69, now Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, and Section 12 of Article 12 of the Constitution of Missouri, 1875, and that said sections are null and void and of no legal force and effect for the following reasons:

(*a*). Because said sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, when enacted by the Legislature, were passed in violation of Section 32 of Article 4 of the Constitution of Missouri, 1865, in this: that the title of said Act of 1872, now Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, purports to prevent unjust discrimination in freight rates, whereas, the body of said Act prohibits discrimination of all kinds without regard to whether the same is unjust or just and reasonable, and the subject of said act is not therefore expressed in its title.

42 (*b*). Because said Sections 3173 and 3211 are repugnant to and in violation of Section 14 of Article 12 of the Constitution of Missouri, 1875, in this: that said section of the Constitution provides for the passage of laws to correct abuses and prevent unjust discrimination and extortions in freight and passenger rates, and establishing reasonable maximum freight rates, whereas the body of said Act of 1872, now Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, prohibits discrimination of all kinds without regard to whether the same is unjust or just and reasonable and fixes arbitrary, unfair and unreasonable maximum rates.

(*c*). Because said sections 3173 and 3211 Revised Statutes of Missouri, 1909, when re-enacted by the Legislature in 1879, were not legally re-enacted but were enacted in violation of Section 28 of Article 4 of the Constitution of Missouri, 1875, in this: that the title of said Act as passed makes the same appear to be an Act to prevent unjust discrimination, whereas, the body of said Act prohibits discrimination of all kinds without regard to whether the rates fixed are unjust or just and reasonable, and the subject of said Act is not therefore clearly expressed in its title.

(*d*) Because said Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, were repealed by an Act of Legislature passed in 1887 entitled, "An Act to Regulate Railroad Coporations," passed at the extra sesion of 1887, same being found in the Session Laws

of 1887 at page 15, now Sections 3185 and 3193 of the Revised Statutes, 1909.

43 For further answer to said count, the defendant says that Section 12 of Article 12 of the Constitution of Missouri, 1875, and Sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Missouri, 1909, are in violation of Section 1 Article 14 of the Amendments to the Constitution of the United States in this: that said Sections of the Constitution of Missouri and of the Revised Statutes of Missouri, deprive defendant of its property without due process of law and *denies* to it the equal protection of the laws.

For further answer to said count, the defendant says that Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, are repugnant to and in violation of Article 5 of the Amendments to the constitution of the United States in this: That said sections deprive the defendant of its property without due process of law.

For further answer to said count, the defendant says that Sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Missouri, 1909, and Section 12 of Article 12 of the Constitution of Missouri, 1875, are in conflict with Section 8 of Article 1 of the Constitution of the United States and the various laws passed by Congress thereunder in this: that the said defendant is engaged in interstate commerce and owns and operates various lines of railroad as a part of its system which run into other states than Missouri and into the States of Kansas, Colorado, Nebraska, Oklahoma,

44 Illinois, Arkansas, and Louisiana, and that the train in which the plaintiff's property described in said count was being transported was at the time engaged in interstate commerce and contained car load lots and shipments of merchandise consigned and being carried from points without the State of Missouri to points within this state, and from points within this state to points without the same and from points without this state across the state of Missouri and to points in other states, and that by reason of the premises this state is without jurisdiction to adopt and pass the sections herein named and to enforce the provisions of the same against this defendant while so engaged in interstate commerce.

For further answer to said count, the defendant says that Sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Missouri, 1909, and Section 12 of Article 12 of the Constitution of Missouri, 1875, are in conflict with Section 8 of Article 1 of the Constitution of the United States and the various laws passed by Congress thereunder in this: that the defendant's railroad is an interstate road and its lines extend over and through the States of Missouri, Kansas, Colorado, Nebraska, Illinois, Oklahoma, Arkansas and Louisiana, and that it is engaged in interstate commerce over its said lines through all of said States and operates trains over

45 the same in transporting freight and passengers through said States; that said section of the Constitution of Missouri and Sections of the Revised Statutes seek to compel the defendant arbitrarily to fix its rates in this State and in all of said States and in

omparison with rates existing in all such States without regard to he laws passed by Congress regulating interstate commerce.

That is to say, all the alleged defenses pleaded to each of the counts n the petition, except the traverses contained in said answer.

And plaintiff assigns as grounds and reasons in support of this notion the following, towit:

First. Said parts of said answer and the alleged defenses therein et forth are based upon an erroneous construction of said provisions f the State and Federal Constitutions, and upon an erroneous con-truction of the statutory provisions referred to in said answer.

Second. Said parts of said answer and defenses, as pleaded, allege rroneous conclusions drawn from said Constitutional and statutory provisions referred to therein.

46 Third. They state no facts constituting any defense to the causes of action contained in the petition.

Fourth. They are improperly pleaded in the answer and can only be urged by demurrer to the petition.

ALEXANDER GRAVES,
Attorney for Plaintiff.

Which motion was taken up by the court on said first day of the June 1912 term of the court, the same being June 10, 1912, and sustained by order duly entered of record, to which action and order of the court in striking out said portions of its answer the defendant at the time duly objected and excepted.

Thereafter on said first day of the June 1912 term of the court, the same being June 10, 1912, a jury being waived said cause was by the consent of the parties taken up and tried by the court without the intervention of a jury. The court found the issues for the plaintiff and rendered judgment for it upon each count of the petition in the following sums:

First count	$130.05
Second count	51.00
Third count	256.50
Fourth count	67.27
Fifth count	103.18
Sixth count	3.18
Seventh count	122.05
47 Eighth count	84.65
Ninth count	108.33
Tenth count	46.20
Eleventh count	47.78
Twelfth count	30.10
Thirteenth count	183.21
Fourteenth count	10.04
Fifteenth count	350.00
Sixteenth count	10.26
Seventeenth count	70.22
Eighteenth count	115.15
Nineteenth count	9.24

Twentieth count ..... 28.
Twenty-first count ..... 13.
Twenty-second count ..... 22.
Twenty-third count ..... 8.
Twenty-fourth count ..... 22.
Twenty-fifth count ..... 38.
Twenty-sixth count ..... 38.
Twenty-seventh count ..... 52.
Twenty-eighth count ..... 17.
Twenty-ninth count ..... 17.
Thirtieth count ..... 6.
Thirty-first count ..... 15.
Thirty-second count ..... 60.
48 Thirty-third count ..... 172.
Thirty-fourth count ..... 4.
Thirty-fifth count ..... 115.
Thirty-sixth count ..... 29.
Thirty-seventh count ..... 12.
Thirty-eighth count ..... 103.
Thirty-ninth count ..... 375.
Fortieth count ..... 158.
Forty-first count ..... 157.
Forty-second count ..... 1044.
Forty-third count ..... 164.
Forty-fourth count ..... 970.
Forth-fifth count ..... 2032.
Forty-sixth count ..... 4317.
Forty-seventh count ..... 4703.

Aggregating upon all the counts the total sum of $16,504.19, which action and finding of the court in *in* rendering judgment each and every count of the forty-seven counts of the petition, t defendant at the time duly objected and excepted.

Motion for New Trial.

Afterwards during the said June, 1912, term of the court and June 12, 1912 and within four days after the sustaining of said m
tion to strike out portions of the defendant's petition a
49 the finding and decision and judgment of the court on t
merits, the defendant filed its motion for new trial, whi said motion omitting formal parts is as follows:

"Comes now the defendant, the Missouri Pacific Railway Co pany, and prays the court to grant it a new trial herein for t following reasons:

First. Because the court erred in striking out all of the defen (except the general denial) pleaded in defendant's answer to ea of the forty-seven counts of the plaintiff's petition.

Second. Because the court erred in not sustaining the defendan objection to the introduction of any testimony under the allegatio of the plaintiff's petition.

Third. Because the court erred in admitting incompetent, irrelevant and immaterial testimony offered on behalf of the plaintiff over the objections and exception of the defendant.

Fourth. Because the court erred in not sustaining the defendant's demurrer to the plaintiff's evidence at the close of plaintiff's case.

Fifth. Because the court erred in not entering a judgment for the defendant instead of the plaintiff.

50 Sixth. Because the court erred in sustaining the plaintiff's motion to strike out the following parts of each and all of the forty-seven counts of the defendant's answer to the plaintiff's petition.

"Comes now the defendant and for its answer to the * * * count of plaintiff's petition, states that the same is founded upon the Session Laws of Missouri, 1872, page 69, now Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, and Section 12 of Article 12 of the Constitution of Missouri, 1875, and that said sections are null and void and of no legal force and effect for the following reasons:

(*a*) Because said sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, when enacted by the Legislature, were passed in violation of Section 32 of Article 4 of the Constitution of Missouri, 1865, in this: that the title of said Act of 1872, now Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, purports to prevent unjust discrimination in freight rates, whereas, the body of said Act prohibits discrimination of all kinds without regard to whether the same is unjust or just and reasonable, and the subject of said act is not therefore expressed in its title.

(*b*) Because said Sections 3173 and 3211 are repugnant to and in violation of Section 14 of Article 12 of the Constitution of Missouri, 1875, in this: that said section of the Constitution provides for the passage of laws to correct abuses and prevent unjust

51 discrimination and extortions in freight and passenger rates, and establishing reasonable maximum freight rates, whereas the body of said Act of 1872, now Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, prohibits discrimination of all kinds without regard to whether the same is unjust or just and reasonable and fixes arbitrary, unfair and unreasonable maximum rates.

(*c*) Because said sections 3173 and 3211 Revised Statutes of Missouri, 1909, when re-enacted by the Legislature in 1879, were not legally re-enacted but were enacted in violation of Section 28 of Article 4 of the Constitution of Missouri, 1875, in this: that the title of said Act as passed makes the same appear to be an Act to prevent unjust discrimination, whereas, the body of said Act prohibits discrimination of all kinds without regard to whether the rates fixed are unjust or just and reasonable, and the subject of said Act is not therefore clearly expressed in its title.

(*d*) Because said Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, were repealed by an Act of Legislature passed in 1887 entitled, "An Act to Regulate Railroad Corporations," passed at the extra session of 1887, same being found in the Session Laws

of 1887 at page 15, now Sections 3185 and 3193 of the Revised Sta
utes, 1909.

For further answer to said count, the defendant says that Sectio
12 or Article 12 of the Constitution of Missouri, 1875, and Sectio
3173 and 3211 and Sections 3185 and 3193 of the Revise
52 Statutes of Missouri, 1909, are in violation of Section 1 Art
cle 14 of the Amendments to the Constitution of the Unite
States in this: that said Sections of the Constitution of Missouri an
of the Revised Statutes of Missouri, deprive defendant of its propert
without due process of law and *denies* to it the equal protection
the laws.

For further answer to said count, the defendant says that Sectio
3173 and 3211 of the Revised Statutes of Missouri, 1909, are r
pugnant to and in violation of Article 5 of the Amendments to t
constitution of the United States in this: That said sections depri
the defendant of its property without due process of law.

For further answer to said count, the defendant says that Sectio
3173 and 3211 and Sections 3185 and 3193 of the Revised Statut
of Missouri, 1909, and Section 12 of Article 12 of the Constitutio
of Missouri, 1875, are in conflict with Section 8 of Article 1 of th
Constitution of the United States and the various laws passed b
Congress thereunder in this: that the said defendant is engage
in interstate commerce and owns and operates various lines of rai
road as a part of its system which run into other states than Missou
and into the States of Kansas, Colorado, Nebraska, Oklahoma, Ill
nois, Arkansas, and Louisiana, and that the train in which th
plaintiff's property described in said count was being transporte
was at the time engaged in interstate commerce and co
53 tained car load lots and shipments of merchandise consigne
and being carried from points without the State of Missou
to points within this state, and from points within this state to point
without the same and from points without this state across the stat
of Missouri and to points in other states, and that by reason of th
premises this state is without jurisdiction to adopt and pass th
sections herein named and to enforce the provisions of the sam
against this defendant while so engaged in interstate commerce

For further answer to said count, the defendant says that Section
3173 and 3211 and Sections 3185 and 3193 of the Revised Statute
of Missouri, 1909, and Section 12 of Article 12 of the Constitutio
of Missouri, 1875, are in conflict with Section 8 of Article 1 of th
Constitution of the United States and the various laws passed b
Congress thereunder in this: that the defendant's railroad is a
interstate road and its lines extend over and through the States o
Missouri, Kansas, Colorado, Nebraska, Illinois, Oklahoma, Arkan
sas and Louisiana, and that it is engaged in interstate commerc
over its said lines through all of said States and operates trains ove
the same in transporting freight and passengers through said States
that said section of the Constitution of Missouri and Sections of th
Revised Statutes seek to compel the defendant arbitrarily to fi

its rates in this State and in all of said States and in com-
54 parison with rates existing in all such States without regard to the laws passed by Congress regulating insterstate commerce."

And afterward on said 10th day of June, 1912, and within four days of the finding and decision of the court herein the defendant filed a motion in arrest of judgment, which motion, in arrest of former judgment is as follows:

Motion in Arrest of Judgment.

Comes now the defendant and moves the court to arrest the judgment herein for the following reason-:

First. Because the petition herein does not state facts sufficient to constitute a cause of action against the defendant.

Second. Because upon the whole record the judgment should be for the defendant instead of the plaintiff.

Afterwards during said June 1912 term of the court and on June 18, 1912, the motion for new trial filed by the defendant was taken up and by the court by order duly entered of record, overruled, to which action of the court in so overruling said motion for new trial, the defendant at the time objected and excepted and saved its exceptions.

55 Afterwards during the said June term 1912 of the court, and on June 18, 1912, the motion in arrest of judgment filed by the defendant was by the court taken up and overruled by order duly made of record. To which action of the court in so overruling said motion in arrest of judgment, the defendant at the time objected and excepted.

Afterwards during the said June 1912 term of the court and on the 19th day of June, 1912, the defendant filed its affidavit for appeal and deposited with the clerk the sum of $10.00 docket fee for the appellate court, said affidavit, omitting formal parts, being as follows:

"H. C. Clerk being duly sworn according to law, upon his oath says that he is the attorney and agent of the defendant, the Missouri Pacific Railway Co., appellant in the above entitled cause, and that the appeal prayed for herein is not made for vexation or delay but because the affiant believes that the appellant is aggrieved by the judgment and decision of this court.

H. C. CLARK.

Subscribed and sworn to before me this 18th day of June, 1912.
[SEAL.] IDA ROSS,
Notary Public.

My commission expires March 25, 1915."

56 The court thereupon, on said 19th day of June, 1912, by order duly made of record, granted the defendant an appeal as prayed for to the Supreme Court of the State of Missouri, and defendant was given leave to file its bill of exceptions on or before October 15, 1912. Leave was given the defendant to file an appeal bond within ten days after the adjournment of court, to be approved by the clerk, which was duly done.

TRANSCRIPT.

On the — day of ——, 1912, the defendant duly filed with the clerk of the Supreme court a certified copy of the judgment and order granting the appeal herein and deposits the required docket fee with the clerk.

Afterwards on October 14, 1912, same being the first day of the regular October 1912 term of the court and within the time allowed by the court, the plaintiff duly presented its bill of exceptions, which was duly signed by the Judge of the Court, trying said cause, Hon. Samuel Davis, and the same was by order of record duly filed and made a part of the record herein, which said bill of exceptions is as follows:

57 In the Circuit Court of Lafayette County, Missouri, at Lexington, June Term, 1912.

McGREW COAL CO., Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY CO., Defendant.

Bill of Exceptions.

Be it remembered, that the following proceedings were had, on the 10th day of June, 1912, in the above entitled cause, same being the first day of the June, 1912, term of the Lafayette County Circuit Court, before the Hon. Samuel Davis, Judge, a jury being by agreement of the parties waived.

Appearances:

For Plaintiff, Hon. Alexander Graves.
For Defendant, Mr. H. C. Clark and Mr. W. H. Chiles.

The defendant having within the time allowed by the Court, to-wit on the 12th day of April, 1912, duly filed an answer herein, which said answer is in words and figures as follows, to-wit:

"In the Circuit Court of Lafayette County, Missouri, at Lexington, February Term, 1912.

McGrew Coal Company, Plaintiff,
vs.
The Missouri Pacific Railway Co., Defendant.

"Comes now the defendant, the Missouri Pacific Railway Company, and files this, its answer to the petition of the plaintiff herein.

"Comes now the defendant and for its answer to the 1st count of plaintiff's petition, states that the same is founded upon the Session Laws of Missouri, 1872, page 69, now Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, and section 12 of Article 12 of the Constitution of Missouri, 1875, and that said sections are null and void and of no legal force and effect for the following reasons:

(*a.*) Because said sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, when enacted by the Legislature were passed in violation of Section 32 of Article 4 of the Constitution of Missouri, 1865, in this: that the title of said Act of 1872, now Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, purports to prevent unjust discrimination in freight rates, whereas, the body of said Act prohibits discrimination of all kinds without regard to whether the same is unjust or just and reasonable, and the subject of said act is not therefore expressed in its title.

59 (*b.*) Because said Sections 3173 and 3211 are repugnant to and in violation of Section 14 of Article 12 of the Constitution of Missouri, 1875, in this: that said section of the Constitution provides for the passage of laws to correct abuses and prevent unjust discrimination and extortions in freight and passenger rates, and establishing reasonable maximum freight rates, whereas the body of said Act of 1872, now sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, prohibits discrimination of all kinds without regard to whether the same is unjust or just and reasonable and fixes arbitrary, unfair and unreasonable maximum rates.

(*c.*) Because said Sections 3173 and 3211 Revised Statutes of Missouri, 1909, when re-enacted by the Legislature in 1879, were not legally re-enacted but were enacted in violation of Section 28 of Article 4 of the Constitution of Missouri, 1875, in this: that the title of said Act as passed makes the same appear to be an Act to prevent unjust discrimination, whereas, the body of said Act prohibits discrimination of all kinds without regard to whether the rates fixed are unjust or just and reasonable, and the subject of said Act is not therefore clearly expressed in its title.

(*d.*) Because said Sections 3173 and 3211 of the Revised Statutes of Missouri 1909, were repealed by an Act of the Legislature passed in 1887 entitled, "An Act to Regulate Railroad Corpora-
60 tions," passed at the extra session of 1887, same being found in the Session Laws of 1887 at page 15, now Sections 3185 and 3193 of the Revised Statutes, 1909.

For further answer to said count, the defendant says that Section 12 of Article 12 of the Constitution of Missouri, 1875, and Sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Missouri, 1909, are in violation of Section 1 of Article 14 of the Amendments to the Constitution of the United States in this; that said Sections of the Constitution of Missouri and of the Revised Statutes of Missouri, deprive defendant of its porperty without due process of law and denies of it the equal protection of the laws.

"For further answer to said count, the defendant says that Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, are repugnant to and in violation of Article 5 of the Amendments to the Constitution of the United States in this: That said Sections deprive the defendant of its property without due process of law.

"For further answer to said count the defendant says that Sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Missouri, 1909, and Section 12 of Article 12 of the Constitution of Missouri, 1875, are in conflict with Section 8 of Article 1 of the Constitution of the United States and the various laws passed by Congress thereunder in this: That the said de-
61 fendant is engaged in interstate commerce and owns and operates various lines of railroad as a part of its system which run into other states than Missouri and into the states of Kansas, Colorado, Nebraska, Oklahoma, Illinois, Arkansas and Louisiana, and that the train in which the plaintiff's property described in said count was being transported was at the time engaged in interstate commerce and contained carload lots and shipments of merchandise consigned and being carried from points without the State of Missouri to points within this state, and from points within this state to points without the same and from points without this state across the state of Missouri and to points in other states, and that by reason of the premises this state is without jurisdiction to adopt and pass the sections herein named and to enforce the provisions of the same against this defendant while so engaged in interstate commerce.

"For further answer to said count, the defendant says that Sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Missouri, 1909, and Section 12 of Article 12 of the Constitution of Missouri, 1875, are in conflict with Section 8 of Article 1 of the Constitution of the United States and the various laws passed by Congress thereunder in this: that the defendant's railroad is an interstate road and its lines extend over and through the States of Missouri, Kansas, Colorado, Nebraska, Illinois, Oklahoma, Arkansas and Louis-
62 iana, and that it is engaged in interstate commerce over its said lines through all of said states and operates trains over the same in transporting freight and passengers through said States; that said section of the Constitution of Missouri and Sections of the Revised Statutes seek to compel the defendant arbitrarily to fix its rates in this State and in all of said States and in comparison with rates existing in all such States without regard to the laws passed by Congress regulating interstate commerce.

For further answer to said count, the defendant denies each and every allegation therein contained.

Wherefore having fully answered, defendant prays to go hence with its costs.

* * * * * * *

Wherefore defendant having fully answered the plaintiff's petition and each and every count thereof prays to go hence with its costs.

R. T. RAILEY,
SCOTT AND BOWKER,
H. C. CLARK,
Attorneys for the Defendants."

(The answer to each of the forty-seven counts of the plaintiff's petition is identical with the above and so appears in said bill of
63 exceptions, but to save encumbering this abstract, only the answer to such first count is printed.

Now on this 10th day of June, 1912, the same being the first day of the regular June, 1912 term of this court, come now the parties by their respective attorneys, and file the following stipulation herein:

"It is hereby stipulated between the parties that the defendant's stations, the rates charged by the defendant, including those paid by the plaintiff, the amount of coal transported and the distances set out in the several counts of the petition are correctly stated therein.

"It is further stipulated that such coal was delivered by plaintiff to the defendant for shipment in the usual and ordinary way without any direction or request by plaintiff's decedent as to what particular trains the same was to be transported in and that the defendant received and transported the same in the usual and ordinary course of business, on the usual trains passing over its roads. It is further agreed that the trains in which the defendant hauled said cars of coal contained other cars and shipments consigned from points within this state to points without the same, from points without the same to points within this state and from points without this state through this state and to points in other states."

ALEXANDER GRAVES,
Attorney for Plaintiff.

L. L. SCOTT,
H. C. CLARK,
Attorneys for Defendant.

64 And afterward on the 10th day of June, 1912, same being the first day of the regular June, 1912, term of this court comes the plaintiff by his attorney and files a motion to strike out parts of the defendant's answer herein, which said motion to strike out is in words and figures as follows:

In the Circuit Court of Lafayette County, Missouri, at Lexington, June Term, 1912.

McGrew Coal Company, Plaintiff,
vs.
The Missouri Pacific Railway Company, Defendant.

"Comes now the plaintiff, McGrew Coal Company, and moves the court to strike out the following part and portions of the defendant's amended answer, to-wit; All the special defenses pleaded therein to each of the counts in plaintiff's petition, numbered from 1 to 47, inclusive, each of said special pleas being substantially, in words and figures, following, to-wit:

"Comes now the defendant and for its answer to the * * * count of plaintiff's petition, states that the same is founded upon the Session Laws of Missouri, 1872, page 69, now Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, and Section 12 of
65 Article 12 of the Constitution of Missouri, 1875, and that said sections are null and void and of no legal force and effect for the following reasons:

(*a*) Because said sections 3173 and 3211 of the Revised Statutes of Missuori, 1909, when enacted by the Legislature, were passed in violation of Section 32 of Article 4 of the Constitution of Missouri, 1865, in this: that the title of said Act of 1872, now Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, purports to prevent unjust discrimination in freight rates, whereas, the body of said Act prohibits discrimination of all kinds without regard to whether the same is unjust or just and reasonable, and the subject of said act is not therefore expressed in its title.

(*b*) Because said Sections 3173 and 3211 are repugnant to and in violation of Section 14 of Article 12 of the Constitution of Missouri, 1875, in this: that said section of the Constitution provides for the passage of laws to correct abuses and prevent unjust discrimination and extortions in freight and passenger rates, and establishing reasonable maximum freight rates, whereas the body of said Act of 1872 now Sections 3173 and 3211 of the Revised Statutes of Missouri 1909, prohibits discrimination of all kinds without regard to whether the same is unjust or just and reasonable and fixes abitrary, unfair and unreasonable maximum rates.

(*c*) Because said sections 3173 and 3211 Revised Statutes of Missouri, 1909, when re-enacted by the Legislature in 1879
66 were not legally re-enacted but were enacted in violation of Section 28 of Article 4 of the Constitution of Missouri, 1875 in this: that the title of said Act as passed makes the same appear to be an Act to prevent unjust discrimination, whereas, the body of said Act prohibits discrimination of all kinds without regard to whether the rates fixed are unjust or just and reasonable, and the subject of said Act is not therefore clearly expressed in its title.

(*d*) Because said Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, were repealed by an Act of Legislature passed in

1887 entitled, "An Act to Regulate Railroad Corporations," passed at an extra session of 1887, same being found in the Session Laws of 1887, at page 15, now Sections 3185 and 3193 of the Revised Statutes, 1909.

For further answer to said count, the defendant says that Section 12 of Article 12 of the Constitution of Missouri, 1875, and Sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Missouri, 1909, are in violation of Section 1 Article 14 of the Amendments to the Constitution of the United States in this: that said Sections of the Constitution of Missouri and of the Revised Statutes of Missouri, deprive defendant of its property without due process of law and denies to it the equal protection of the laws.

For further answer to said count, the defendant says that
67 Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, are repugnant to and in violation of Article 5 of the Amendments to the constitution of the United States in this: That said sections deprive the defendant of its property without due process of law.

For further answer to said count, the defendant says that Sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Missouri, 1909, and Section 12 of Article 12 of the Constitution of Missouri, 1875, are in conflict with Section 8 of Article 1 of the Constitution of the United States and the various laws passed by Congress thereunder in this: that the said defendant is engaged in interstate commerce and owns and operates various lines of railroad as a part of its system which run into other states than Missouri and into the States of Kansas, Colorado, Nebraska, Oklahoma, Illinois, Arkansas, and Louisiana, and that the train in which the plaintiff's property described in said count was being transported was at the time engaged in interstate commerce and contained car load lots and shipments of merchandise consigned and being carried from points without the State of Missouri to points within this state, and from points within this state to points without the same and from points without this state across the state of Missouri and to points in other states, and that by reason of the premises this state is without jurisdiction to adopt and pass the sections herein named and to
68 enforce the provisions of the same against this defendant while so engaged in interstate commerce.

For further answer to said count, the defendant says that Sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Missouri, 1909, and Section 12 of Article 12 of the Constitution of Missouri, 1875, are in conflict with Section 8 of Article 1 of the Constitution of the United States and the various laws passed by Congress thereunder in this: that the defendant's railroad is an interstate road and its lines extend over and through the States of Missouri, Kansas, Colorado, Nebraska, Illinois, Oklahoma, Arkansas and Louisiana, and that it is engaged in interstate commerce over its said lines through all of said States and operates trains over the same in transporting freight and passengers through said States; that said section of the Constitution of Missouri and Sections of the Revised Statutes seek to compel the defendant arbitrarily to fix its rates in

this State and in all of said States and in comparison with rates existing in all such States without regard to the laws passed by Congress regulating interstate commerce."

That is to say, all the alleged defenses pleaded to each of the counts in the petition, except the traverses contained in said answer. And plaintiff assigns as grounds and reasons in support of this motion the following, to-wit:

69 First. Said parts of said answer and the alleged defenses therein set forth are based upon an erroneous construction of said provisions of the State and Federal Constitutions, and upon an erroneous construction of the statutory provisions referred to in said answer.

Second. Said parts of said answer and defenses, as pleaded, allege erroneous legal conclusions drawn from said constitutional and statutory provisions referred to therein.

Third. They state no facts constituting any defense to the causes of action contained in the petition.

Fourth. They are improperly pleaded in the answer and can only be urged by demurrer to the petition.

ALEXANDER GRAVES,
Attorney for Plaintiff.

And afterwards on the said 10th day of June, 1912, same being the first day of the regular June 1912, term of the Circuit Court of Lafayette County, Missouri, at Lexington, the motion to strike out part of defendant's answer being called up, the following further proceedings were had and entered of record in the said above entitled cause.

Mr. Graves: "In connection with the motion to strike out parts of the answer herein, I desire to offer the stipulation of facts filed herein."

70 Mr. Clark: "I apprehend that the plaintiff will wish to offer this stipulation of facts on the trial of the case, but I can see no place it can have in the consideration of the legal question which is before the Court in passing upon this motion. And we object to its introduction here."

The stipulation was admitted and heard in evidence. To which action of the court the defendant objected, and excepted. Which stipulation so offered in evidence is as follows:

It is hereby stipulated between the parties that the defendant's stations, the rates charged by the defendant, including those paid by the plaintiff, the amount of coal transported and the distances set out in the several counts of the petition are correctly stated therein. It is further stipulated that such coal was delivered by the plaintiff to the defendant for shipment in the usual and ordinary way without any direction or request by plaintiffs as to what particular trains the same was to be transported in and that the defendant received and transported the same in the usual and ordinary course of business on the usual trains passing over its road. It is further agreed that the train in which the defendant hauled said cars of coal contained

other cars and shipments consigned from points from within this state, to points without the same, from points without the came
71 to points within this state, and from points without this state through this state and to points in other states.

(Signed) ALEXANDER GRAVES,
Attorney for Plaintiffs.
H. C. CLARK AND
L. L. SCOTT,
Attorneys for Defendant.

Whereupon the plaintiff's said motion to strike out parts of defendant's answer coming on for hearing, and the parties appearing by their attorneys, the same is taken up and submitted to the Court, and the Court being duly advised, and fully considering the premises, it is ordered and adjudged by the Court that said motion to strike out be sustained, and all said parts of said answer complained of in said motion be stricken out, to which action and judgment of the court in sustaining said motion to strike out, defendant's counsel objected and at the time excepted.

And afterward, on the said 1st day of the June, 1912 term of the Circuit Court of Lafayette County, Missouri, at Lexington, same being the 10th day of June, 1912, come the parties hereto by their respective attorneys, and this cause being called for final hearing and trial, and a jury being waived by consent of the parties, this cause is taken up and by consent of the parties to be tried by the court without the intervention of a jury. Whereupon the following proceedings were had:

72 Mr. Graves: "The plaintiff desires to offer the following stipulation containing an agreed statement of the facts in this case."

Mr. Clark: "The defendant objects to the introduction of any testimony in this cause for the reason that the petition does not state facts sufficient to constitute a cause of action against the defendant."

Court: "Objection overruled."

To which ruling of the court the defendants by its counsel then and there excepted and saved its exceptions.

In the Circuit Court of Lafayette County, Mo., June Term, 1912.

McGREW COAL CO., Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY CO., Defendants.

Stipulation.

It is hereby stipulated between the parties that the defendant's stations, the rates charged by the defendant, including those paid by the plaintiff, the amount of coal transported and the distances
73 set out in the several counts of the petition are correctly stated therein.

It is further stipulated that such coal was delivered by the plaintiff to the defendant for shipment in the usual and ordinary way without any direction or request by plaintiff as to what particular trains the same was to be transported in and that the defendant received and transported the same in the usual and ordinary course of business on the usual trains passing over its road. It is further agreed that the trains in which the defendant hauled said cars of coal contained other cars and shipments consigned from points within this state to points without the same, from points without the same to points within this state and from points without this state through this state and to points in other states.

ALEXANDER GRAVES,
Attorney for Plaintiff.
L. L. SCOTT,
H. C. CLARK,
Attorneys for Defendant.

Mr. Graves: "The plaintiff rests."

Mr. Clark: "On behalf of the defendant I desire to offer the following instruction, and ask the court to declare the law to be that under the pleadings and the admissions in this case, the plaintiff is not entitled to recover."

74 Court: "The request will be refused and the instructions refused."

To which ruling of the court in refusing to grant such request and declaration of law on behalf of the defendant, the defendant by its counsel then and there duly objected and excepted and saved its exceptions.

Mr. Clark: "The defendant does not desire to offer any evidence."

Whereupon the defendant asked the court to give the following instruction and declaration of law:

"The court declares the law to be that under the pleadings and admissions in this case, the plaintiff is not entitled to recover."

Which declaration of law was by the court refused. To which action of the court in refusing to give such instruction and declaration of law, the defendant, by its counsel, then and there duly objected and excepted and saved its exceptions.

Whereupon the court on said 10th day of June, 1912, same being the first day of the June, 1912, term of the Lafayette County Circuit Court, found the issues for the plaintiff and rendered the following judgment in the above entitled cause.

75 (Clerk here copy judgment.)

To which action, finding and judgment of the court the defendant by its counsel then and there duly objected and excepted and saved its exceptions.

And afterwards, on the 12th day of June, 1912, the same being the third day of the regular June 1912 term of the Lafayette County Circuit Court and during said term, and within four days after the said finding and rendition of said judgment herein, the defendant

a motion for a new trial in the above entitled cause, which said ion is in words and figures as follows:

he Circuit Court of Lafayette County, Missouri, at Lexington, June Term, 1912.

McGrew Coal Co. Plaintiff,
vs.
The Missouri Pacific Railway Company, Defendant.

Motion for a New Trial.

Comes now the defendant, the Missouri Pacific Railway Company d prays the court to grant it a new trial herein for the following sons:

First. Because the court erred in striking out all of the defenses (except the general denial) pleaded in defendant's answer to each of the forty-seven counts of the plaintiff's ition.

Second. Because the court erred in not sustaining the defendant's jection to the introduction of any testimony under the allegations the plaintiff's petition.

Third. Because the court erred in admitting incompetent, irrele- nt and immaterial testimony offered on behalf of the plaintiff over e objections of the defendant.

Fourth. Because the court erred in not sustaining the defendant's murrer to the plaintiff's evidence at the close of the plaintiff's case.

Fifth. Because the court erred in not entering a judgment for the fendant instead of the plaintiff.

Sixth. Because the court erred in sustaining the plaintiff's motion strike out the following parts of each and all of the forty-seven unts of the defendant's answer to the plaintiff's petition:

"Comes now the defendant and for its answer to the — count plaintiff's petition, states that the same is founded upon the Session ws of Missouri, 1872, page 69, now Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, and section 12 of Article 12 of the Constitution of Missouri, 1875, and that said sections are null and void and of no legal force and effect for the fol- wing reasons:

(*a*) Because said sections 3173 and 3211 of the Revised Statutes Missouri, 1909, when enacted by the Legislature were passed in iolation of Section 32 of Article 4 of the Constitution of Missouri, 865, in this: that the title of said Act of 1872, now Sections 3173 nd 3211 of the Revised Statutes of Missouri, 1909, purports to revent unjust discrimination in freight rates, whereas, the body of aid Act prohibits discrimination of all kinds without regard to hether the same is unjust or just and reasonable, and the subject f said act is not therefore expressed in its title.

(*b*) Because said Sections 3173 and 3211 are repugnant to and n violation of Section 14 of Article 12 of the Constitution of Mis-

souri, 1875, in this: that said section of the Constitution provides for the passage of laws to correct abuses and prevent unjust discrimination and extortions in freight and passenger rates, and establishing reasonable maximum freight rates, whereas the body of said Act of 1872, now sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, prohibits discrimination of all kinds without regard to whether the same is unjust or just and reasonable and fixes arbitrary, unfair and unreasonable maximum rates.

78 (*c*) Because said Sections 3173 and 3211 Revised Statutes of Missouri, 1909, when re-enacted by the Legislature in 1879 were not legally re-enacted but were enacted in violation of Section 28 of Article 4 of the Constitution of Missouri, 1875, in this: that the title of said Act as passed makes the same appear to be an Act to prevent unjust discrimination, whereas, the body of said Act prohibits discrimination of all kinds without regard to whether the rates fixed are unjust or just and reasonable, and the subject of said Act is not therefore clearly expressed in its title.

(*d*) Because said Sections 3173 and 3211 of the Revised Statutes of Missouri 1909, were repealed by an Act of the Legislature passed in 1887 entitled, "An Act to Regulate Railroad Corporations," passed at the extra session of 1887, same being found in the Session Laws of 1887 at page 15, now Sections 3185 and 3193 of the Revised Statutes 1909.

For further answer to said count, the defendant says that Section 12 of Article 12 of the Constitution of Missouri, 1875, and Sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Missouri, 1909, are in violation of Section 1 of Article 14 of the Amendments to the Constitution of the United States in this: that said Sections of the Constitution of Missouri and of the Revised Statutes of Missouri, deprive defendant of its property without due process of law and *denies* to it the equal protection of the laws.

79 "For further answer to said count, the defendant says that Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, are repugnant to and in violation of Article 5 of the Amendments to the Constitution of the United States in this: That said Sections deprive the defendant of its property without due process of law.

"For further answer to said count the defendant says that Sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Missouri, 1909, and Section 12 of Article 12 of the Constitution of Missouri, 1875, are in conflict with Section 8 of Article 1 of the Constitution of the United States and the various laws passed by Congress thereunder in this: That the said defendant is engaged in interstate commerce and owns and operates various lines of railroad as a part of its system which run into other states than Missouri and into the states of Kansas, Colorado, Nebraska, Oklahoma, Illinois, Arkansas and Louisiana, and that the train in which the plaintiff's property described in said count was being transported was at the time engaged in interstate commerce and contained car load lots and shipments of merchandise consigned and being carried from points without the State of Missouri to points within this

te, and from points within this state to points without the same and from points without this state across the state of Missouri and to points in other states, and that by reason of the premises this state is without jurisdiction to adopt and pass the tions herein named and to enforce the provisions of the same inst the defendant while so engaged in interstate commerce.

For further answer to said count, the defendant says that Secns 3173 and 3211 and Sections 3185 and 3193 of the Revised tutes of Missouri, 1909, and Section 12 of Article 12 of the Conution of Missouri, 1875, are in conflict with Section 8 of Article f the Constitution of the United States and the various laws passed Congress thereunder in this: that the defendant's railroad is an terstate road and its lines extend over and through the States of issouri, Kansas, Colorado, Nebraska, Illinois, Oklahoma, Arkans and Louisiana, and that it is engaged in inter-state commerce over said lines through all of said states and operates trains over the me in transporting freight and passengers through said States; at said section of the Constitution of Missouri and Sections of the evised Statutes seek to compel the defendant arbitrarily to fix its tes in this State and in all of said States and in comparison with tes existing in all such States without regard to the laws passed Congress regulating interstate commerce.

H. C. CLARK,
L. L. SCOTT,
CHILES & CHILES,
Attorneys for Defendant.

And afterwards, on the 12th day of June, 1912, same being the 3d day of the regular June, 1912, term of the Lafaye County Circuit Court and during said term of court, and within ur days after the finding and rendition of the judgment herein, e defendant filed a motion in arrest of judgment herein, which id motion is in words and figures as follows:

the Circuit Court of Lafayette County, Missouri, at Lexington, June Term, 1912.

McGrew Coal Company, Plaintiff,
vs.
The Missouri Pacific Railway Co., Defendant.

Motion in Arrest of Judgment.

Comes now the defendant and moves the court to arrest the judgent herein for the following reasons:

First. Because the petition herein does not state facts sufficient to constitute a cause of action against the defendant.

Second. Because upon the whole record the judgment should be for the defendant instead of the plaintiff.

H. C. CLARK,
L. L. SCOTT,
CHILES & CHILES,
Attorneys for Defendant.

And afterwards, on the 18th, day of June, 1912, same being the 8th day of the regular June 1912, term of the Lafayette Circuit Court and during said term of court, the court having fully seen and heard said motion for a new trial overruled said motion and refused to grant said new trial as prayed by the defendant. To which action and ruling of the court in overruling said motion and in refusing to grant it a new trial herein the defendant by its counsel then and there duly objected and excepted and saved its exceptions.

And afterwards on the 18th day of June, 1912, same being the 8th day of the regular June, 1912, term of the Lafayette County Circuit Court and during said term, the court having fully seen and heard said motion in arrest of judgment, overruled same and refused to arrest the judgment herein. To which action — the court in overruling said motion and refusing to arrest the judgment herein, the defendant by its counsel then and there duly objected and excepted and saved its exceptions.

83 And afterwards, on the 19th day of June, 1912, same being the 9th day of the regular June, 1912, term of the Lafayette County Circuit Court and during said term, the defendant by its counsel filed an affidavit for an appeal to the Supreme Court of Missouri, which said affidavit for appeal is in words and figures as follows, towit:

In the Circuit Court of Lafayette County, Missouri, at Lexington, June Term, 1912.

McGrew Coal Company, Plaintiff,
vs.
The Missouri Pacific Railway Co., Defendant.

H. C. Clark being duly sworn according to law, upon his oath says that he is the attorney and agent of the defendant, the Missouri Pacific Railway Co., appellant in the above entitled cause, and that the appeal prayed for herein is not made for vexation or delay but because the affiant believes that the appellant is aggrieved by the judgment and decision of this court.

H. C. CLARK.

Subscribed and sworn to before me this 18th day of June, 1912.

IDA ROSS,
Notary Public.

My commission expires March 25th, 1915.

84 And on the 19th day of June, 1912, same being the 9th day of the regular June, 1912 term of the Lafayette County Circuit Court and during said term, the court having fully examined and considered said affidavit for appeal by the defendant and approving and finding the same proper and sufficient, granted and allowed the defendant an appeal to the Supreme Court of the State of Missouri, and leave was granted the defendant to file its bill of excep-

tions herein on or before the 15th day of October, 1912, and leave was given the defendant to file appeal bond in the sum of Thirty-three Thousand dollars within ten days after the adjournment of this term of the court, said bond to be approved by the clerk.

And afterward in vacation of the court on June 28, 1912, and within ten days after the adjournment of the regular June term, the following further proceedings were had and entered of record, to-wit:

Now at this day comes the defendant within the time allowed by the court, and files its appeal bond in the sum of Thirty-three Thousand Dollars, which said appeal bond was approved by the Clerk of the Circuit Court of Lafayette County, Missouri, on June 28, 1912.

And now within the time heretofore allowed by the court and on the 14th day of October, 1912, and during the October term of the court, the defendant presents to the Hon. Samuel Davis,
85 Judge of the Circuit Court of Lafayette County, Missouri, this, its bill of exceptions, and prays that the same may be allowed, signed, sealed, filed and made a part of the record herein, which is accordingly done this 14th day of October, 1912.

(Signed) SAMUEL DAVIS,
Judge of the 15th Judicial Circuit of the State of Missouri; Judge of the Circuit Court of Lafayette County, Missouri.

The above is a true and complete abstract of the record herein.

W. M. BOWKER,
H. C. CLARK,
Attorneys for Appellant.

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87 In the Supreme Court of Missouri, in Banc, April Term, 1915.

And thereafter, to-wit, on the 7th day of May, 1915, the following further proceedings were had and entered of record in said cause.

17317.

McGrew Coal Company, Respondent,
vs.
The Missouri Pacific Railway Company, Appellant.

Come now the said parties, by attorneys, and submit this cause to the court on briefs.

88 In the Supreme Court of Missouri, in Banc, April Term, 1915.

And thereafter, to-wit, on the 29th day of June 1915, the following further proceedings were had and entered of record in said cause.

McGrew Coal Company, Respondent,
vs.
Missouri Pacific Railway Company, Appellant.

Appeal from the Circuit Court of Lafayette County.

Now at this day come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises doth consider and adjudge that the judgment aforesaid in form aforesaid by the said Circuit Court of Lafayette County rendered, be in all things affirmed, and stand in full force and effect; and that the said respondent recover against the said appellant its costs and charges herein expended and have therefor execution. (Opinion filed.)

Which said opinion is in words and figures as follows, to-wit:

In the Supreme Court of Missouri, in Banc, April Term, 1915.

No. 17317.

McGrew Coal Company, Respondent,
vs.
Missouri Pacific Railway Company, Appellant.

This is an action brought in the Lafayette county circuit court, ıder sections 3173 and 3211, R. S. 1909, to recover freight overarges. From a judgment for Plaintiff, defendant appealed.

Each count of the petition is in legal effect identical with the unts of the petition in McGrew v. Railroad, 258 Mo. 23, and with ose in the cases between the same parties cited in the opinion in at case, Ibid. l. c. 25, differing only in amounts, dates and destiation of shipments and in distances used for purposes of Comarison.

The trial court struck out all of the answer except the general enial, and the exception to that ruling has been preserved for view.

A stipulation was filed which settled all the facts in accordance with the allegations of the petition. There was no waiver of) the penalty as in the case in the 258th Mo., but the finding of the court upon each count was confined to the amount of e overcharge alleged. The aggregate of the findings and judgents on the several counts was $16,504.19.

The appeal in this case was taken in 1912, more than a year and half prior to the decision of this court in McGrew v. Railroad, 258 o. 23. The assignments of error in this case, in legal effect, and e points and authorities, verbatim, are identical with those in that se. The authorities cited are exactly the same. No argument is dvanced in this case which was not advanced in that. That decision as rendered by Court in Banc, six judges concurring and one ot sitting. The opinion in that case contains an epitome of the story of the litigation between James C. McGrew and appellant. needs not be repeated here. The questions presented have all been onsidered heretofore with great care and at great length and constently have been decided against appellant. Upon the authority McGrew v. Railroad, 258 Mo. 23, and the cases cited therein, this dgment is affirmed. All concur, except Graves, J. not sitting.

JAMES T. BLAIR, *J.*

In the Supreme Court of Missouri, in Banc, April Term, 1915.

And thereafter, to-wit, on the 5th day of July, 1915, the following rther proceedings were had and entered of record in said cause.

17317.

McGrew Coal Company, Respondent,
vs.
Missouri Pacific Railway Company, Appellant.

Comes now said appellant, by attorney, and files its motion for a rehearing herein.

Which said motion for rehearing is in words and figures as follows, to-wit:

92 In the Supreme Court of Missouri. En Banc.

No. 17317.

McGrew Coal Company, Respondent,
vs.
The Missouri Pacific Railway Company, Appellant.

Motion for Rehearing.

Comes now the Missouri Pacific Railway Company, appellant herein, and prays the court to grant it a re-hearing in the above entitled cause for the following reasons.

First. Because the decision in this case deprives the appellant of its property without due process of law and denies to it the equal protection of the law in violation of Section 1, Article 14 of the Amendments to the Constitution of the United States.

Second. Because Section 3173 and 3211, and Section 3185 and 3193 of the Revised Statutes of Missouri, 1909, and Section 12 of Article 12 of the Constitution of Missouri, 1875 are in conflict with Section 8 of Article 1 of the Constitution of the United States, and although such question was duly raised by appellant in its
93 answer and presented in its brief, the same has been overlooked by the Court in the decision of this case.

Third. Because the appellant in its brief duly presented to the court for its decision the question as to whether Section 3173 Revised Statutes of the State of Missouri, 1909, and Section 12 of Article 12 of the Constitution of Missouri 1875 were in violation of the 14th Amendment of the Constitution of the United States of America; and that the determination of said question would be decisive of this case and that the court overlooked said question presented by the appellant.

Fourth. Because the court failed to pass upon the question duly presented by the appellant in its brief the question as to whether the act of 1872 was ever legally adopted by the General Assembly as required by the Constitution of 1865 of Missouri as said question so submitted was decisive of the case at bar but that said question was by the Court overlooked in its opinion.

Fifth. Because the court failed to consider the question as to

whether or not the act of 1872 was repealed by Sections 12 and 14 of the Constitution of Missouri 1875 that said question was decisive of the case at bar and was duly submitted to the Court by counsel in their brief.

94 Sixth. Because the court failed to consider the question as to whether plaintiff's petition alleged any cause of action against the defendant as set forth in appellant's brief; that said question was duly presented to the court and that the question was decisive of the case at bar but that the court failed to consider the matter in its opinion.

Seventh. Because the question as to the sufficiency of respondent's petition as set forth in appellant's brief was not passed upon by the Court in the case of McGrew vs. The Missouri Pacific Railway Co., 230 Mo. 496; that said question raised by the appellant in its brief is decisive of the case at bar but was not passed upon by the Court in its opinion.

Eighth. Because the decision of the Court herein is in conflict with the case of Brannock vs. Railroad, 200 Mo. 561 which is a controlling decision and in direct conflict with the opinion of the Court herein.

Wherefore, appellant prays the Court to grant it a rehearing of said case.

EDW. J. WHITE,
JAS. F. GREEN,
W. M. BOWKER,
H. C. CLARK,
Attorneys for Appellant.

95 In the Supreme Court of Missouri. En Banc.

No. 17317.

McGrew Coal Company, Respondent,
vs.
The Missouri Pacific Railway Company, Appellant.

To Hon. Alexander Graves, Attorney for Respondent:

You are hereby notified that the appellant will file in the Supreme Court on July 6, 1915, a motion for rehearing in the above case, copy of which is hereto attached.

H. C. CLARK,
Attorney for Appellant.

H. C. Clark being duly sworn, says that he served a copy of the attached motion and the appellant's suggestion thereon, on the respondent's attorney of record, Hon. Alexander Graves by mailing him a copy of the same at his address at Lexington, Missouri, on July 3, 1915.

A. J. KING, [SEAL.]
Notary Public.

Subscribed and sworn to before me this 3rd day of July, 1915.
My Commission expires January 25, 1917.

96 In the Supreme Court of Missouri, in Banc, April Term, 1915.

And thereafter, to-wit, on the 12th day of July, 1915, the following further proceedings were had and entered of record in said cause.

17317.

McGrew Coal Company, Respondent,
vs.
Missouri Pacific Railway Company, Appellant.

Now at this day the court having considered and fully understood the motion for a rehearing heretofore filed herein by the said appellant, doth order that said motion be, and the same is hereby, overruled.

97 In the Supreme Court of Missouri, October Term, 1913, in Banc.

No. 16475.

James C. McGrew, Resp.,
vs.
Missouri Pacific Ry. Co., App.

Statement.

The petition alleges a freight overcharge for one hundred and ten shipments of coal over the line of defendant railway and between the stations thereon of Myrick and Sedalia, a distance of fifty-seven miles, as contrasted with the rates charged for similar shipments over two other stations of defendant road, Liberal and Grandy, distant from each other seventy-seven miles. For the transportation between the first two points the rate exacted was sixty-five cents per ton by the car load, and between the others the charge was only fifty cents per ton by the car load. That the aggregate of the excess plaintiff was thus compelled to pay, was sixteen thousand six hundred forty one dollars and ninety one cents ($16,141.91).

98 Upon the trial it was admitted in open court by counsel for defendant, that the one hundred and ten counts of plaintiff's petition are true and correct. And plaintiff by stipulation, waived his claim for all penalties for violation of the laws upon which his petition was founded. Upon the submission of the case to the court without a jury, judgment was given for plaintiff for the sum stated in his petition as the total of the excess payments made by him. Defendant duly appealed.

Opinion.

BOND, *J.*, (after stating the facts as above):

Appellant claimed in its amended answer which was stricken out by the trial court, whose ruling it assigned for error; first that sections 3173 and No. 3211 of the Revision of 1909 which were enacted in 1872 and brought forward through all the subsequent revisions and are now found without change in our present statute, were in contravention of the State constitutions of 1865 and 1875, and the Federal Constitution; second, that said acts were repealed in 1887 at an extra session of the legislature; third, that section 12
99 article 12 of the Constitution of Missouri of 1875 is in violation of section 1 article 14 of the Constitution of the United States.

If there is any merit in these contentions they are still open to review, for when they were stricken out of its answer, appellant preserved an exception and stood upon its answer without pleading further, and by its appeal has invoked the ruling of this court upon these questions. This, however, is not the first time that duty has been imposed upon this court by appellant. A petition of which the present is a copy except as to dates and amounts of shipments, was before this court for review upon an appeal by the present plaintiff from the judgment sustaining a demurrer of the present defendant in a similar action. (McGrew vs. Railway Co. 177 Mo. 533.) The theory upon which the lower court dismissed the petition in that case was that the same section of the statute now before this court, had been repealed by the act of 1887. Judge Gantt, speaking for this court, held that the trial court had misconceived the law, and that the section of the statute on which that case was bottomed (same as the one on which this petition is founded),
100 was not impliedly repealed by the latter act of 1887, and that the petition in that case stated a good cause of action.

This decision and its ruling as to a sufficiency of a petition framed under this statute to state a cause of action, was approved and repeated in Cohn v. Railway Co., 181 Mo. l. c. 45, and it was followed in the same case which reached the Kansas City Court of Appeals on a retrial after a remand by this Court. (McGrew vs. Railway Co., 118 Mo. App. 379.)

But these litigants finally had the ear of this court in Banc. (McGrew v. Railway, 230 Mo. 496.) In that decision an eminent Lawyer was called to assist this court as special judge. His performance of that duty, is an example of learning, logic and thorough investigation. The conclusions there announced covered every point of attack then made and now made, as to the statutes or constitutional provisions which gave rise to the present case. The discussion is clear and convincing to a demonstration and leaves nothing further to be said on the subject unless we shall paraphrase or republish his language. If we did the former we should hazard

the loss of the syllogistic force and clarity of the origina
101 If we did the latter we should only swell our reports by pu
lishing for a second time what is already contained in ther
That decision contains rulings in a connected and complete forr
and seriatim, upon every question which is presented on the prese
appeal. With the decision in that case we are content.

We fully concur in its doctrines, and for the reasons there give
the present judgment is affirmed.

All concur except Graves, J., not sitting.

HENRY W. BOND, *J.*

102 In the Supreme Court of Missouri, Court in Banc, Octob
Term, 1910.

No. 12887.

JAMES C. McGREW, Respondent,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Statement.

Differences in opinion in Division resulted in the filing of tw
opinions therein, and in the transfer of the case to Banc. On
member of the court having been of counsel in the trial court, onl
six of the judges sat in the case in Banc, and they dividing equally
a special judge was called in.

This is an action by plaintiff to recover damages from defendan
for its violation of the short-haul rule in charging him greate
amounts, i. e., higher rates per ton, for transportation of freigh
for certain distance over its railroad than it charged fo
103 transportation of freight of the same class for greater dis
tances over said railroad.

Plaintiff owned and operated a coal mine at Myrick, Missouri
on the line of said railroad, and shipped his coal from there to vari
ous stations on said railroad in this state. The petition containe
thirty-nine counts, covering a great amount of transportation fron
Myrick to different stations. In each count were stated the quantity
in tons of coal transported, the station of destination, its distanc
from Myrick, the rate per ton charged, the lower rate charged fo
coal of the same class from Myrick to another station at a greate
distance from Myrick on defendant's railroad in Missouri, and the
total excess of the charges illegally made for all the coal transported

In its answer to each count defendant admitted the allegations o
fact in the petition as above stated, but it denied that the rate charge
plaintiff was illegal for reasons stated. Those reasons were that the
rate charged plaintiff had been fixed by the Board of Railroad and
Warehouse Commissioners, that the rate from Myrick to the more
distant station had also been fixed by said board and had been made
by defendant because of the fact that said station was a competitive

point, which rendered the conditions and circumstances of the latter station dissimilar from those of the station to which plaintiff had shipped his coal, and prevented the difference between the two rates constituting discrimination.

The case was tried by the court without a jury.

Plaintiff submitted his case upon the pleadings.

Defendant asked the court to give a declaration of law to the effect that plaintiff was not entitled to a judgment upon the pleadings, and the court refused it.

Defendant offered printed and unauthenticated copies of the reports of the Board of Railroad and Warehouse Commissioners
104 in support of its answer. The trial court rejected same, because of the lack of authentication.

Defendant offered to prove by its general freight agent the reason for the differences in rates complained of by the plaintiff, but the court refused to receive the evidence.

At the close of the evidence, the court gave a declaration of law for plaintiff to the effect that upon the pleadings and evidence the finding and judgment should be for plaintiff.

In accordance with said declaration of law the court rendered judgment for plaintiff on the various counts of the petition for the amount of the excessive charges respectively stated therein, but not for the statutory penalties sued for. The judgment was solely for said excessive charges, and aggregated $7,462.43.

On this appeal by defendant from that judgment, defendant does not urge as error the action of the trial court in rejecting the evidence offered as hereinbefore stated, but assuming that plaintiff's action is entirely founded upon sections 1126 and 1160, Revised Statutes 1899, it seeks to reverse said judgment on the ground that said sections of the statute are invalid, because unconstitutional for various reasons assigned, and because repealed by a subsequent statute.

It is unnecessary at this place to further explain the nature of the objections urged against the validity of said sections; that will be done in the opinion.

Plaintiff's counsel says that said objections were not made in the trial court, and contends that they cannot be made in this court for the first time.

No further statement is deemed necessary at this time.

Opinion.

I. It is, of course, true, as contended by plaintiff's counsel, that an appellant cannot try a case on one theory in the trial court and upon another theory in the appellate court, and that, gen-
105 erally speaking, if a constitutional question is not raised at the trial, it cannot be urged upon appeal.

But where plaintiff's cause of action is founded upon a statute, the constitutionality and life of the statute are involved from the start to the finish, because unless the statute has legal force and effect

plaintiff has no cause of action, and defendant, at any time and in any court until the final end of the case, has the right to object that plaintiff's petition does not state facts sufficient to constitute a cause of action for the reason that the statute upon which it is founded is unconstitutional or has been repealed. Defendant has the right to object for the first time in the appellate court that the petition does not state a cause of action, and it matters not what the ground of objection may be, provided only that it be good and sufficient in law. [R. S. 1899, sec. 602; Andrews v. Lynch, 27 Mo. 167; Burns v. Patrick, 27 Mo. 434; Syme v. Steamboat, etc., 28 Mo. 335; Weil v. Greene County, 69 Mo. 281; Wells v. Mutual Benefit, 126 Mo. 630; State ex rel. v. Smith, 141 Mo. 1; State ex rel. v. Smith, 177 Mo. 69, 92; Kaukauna Co. v. Green Bay Co., 142 U. S. 254.]

II. The first objection made to the validity of said sections of the statutes is that the act containing them was not passed in accordance with the provision of the Constitution then in force in relation to the title of laws enacted by the Legislature.

Said sections of the Revised Statutes of 1899 were sections 1 and 4 of an act of the Legislature approved April 1, 1872, Laws 1871, p. 69. Section 1126 was section 1 of said act; section 1160 was section 4.

At the time said act was passed the Constitution of 1865 was in force. Section 32, article 4, of said Constitution provided: "No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title." * * *

The title of said act was: "An act to prevent unjust dis-
106 crimination and extortion in the rates to be charged by the different railroads in this State, for the transportation of freight on said roads."

Section 1 of said act (now sec. 1126, R. S.), prohibited every railroad company in the State from doing three things: 1. From charging for the transportation of property for any distance over its road any larger amount as compensation, than is charged by it for the transportation of similar quantities of the same class of property over a greater distance over its road. 2. From charging different rates for receiving, handling or delivering freight at different points on its road, or any road used by it in connection therewith. 3. From charging for the transportation of property over any portion of its road a greater amount as compensation, than shall be charged by it for the transportation of similar quantities of the same class of property over any other portion of its road of equal distance.

Section 4 of said act (now sec. 1160, R. S.), merely prescribed a penalty for violating the provisions of the act, and need not be considered further in this connection.

The objection is that the body of the act, i. e., section 1 thereof, was broader than the title.

In support of that objection counsel argue that the title was aimed at unjust discrimination only, whereas the body of the act prohibited every discrimination, just, as well as unjust. They say that the title conceded that there might be just discrimination, but that the body of the act denied such concession. They say that the title

is merely declaratory of the common law, which prohibits only
ijust discrimination and tolerates just discrimination, while the
dy of the act prohibited every discrimination without regard to
ıether it was just or unjust.

I do not think any of these arguments sound. The body
)7 of the act did not prohibit all discriminations; it prohibited
only the three discriminations specified therein. It did not
'ohibit any just discrimination at all; the legislative prohibition
as a legislative condemnation of the specified discriminations as
ajust and they became unjust by reason of such condemnation.
rant that the title conceded that there might be just discrimina-
on, how did that concession imply that the body of the act would
ot condemn given discriminations as unjust, and prohibit them
nder pains and penalties? The common law rule as to discrim-
ıations by common carriers is not entirely settled. The courts are
ot all agreed as to what that rule is. [Interstate Com. Commission
. B. & O. Railroad, 145 U. S. 263, 275.] But it is conceded
hat at common law only unjust discriminations are condemned,
nd that the question as to whether a discrimination is unjust is
or the courts to decide. At common law there is no list of specific
iscriminations condemned as unjust. Every case is to be decided
y the court on its own facts.

Counsel's argument, therefore, that the title was declaratory of
he common law, is that the title indicated that the act would not
leclare or define anything to be an unjust discrimination and
rohibit it, but that the act would merely "prevent" such things
s the courts might decide to be unjust discriminations. If such a
hing was capable of accomplishment legally, I do not think that
he title can be so construed. The title clearly indicated that the
ct would prohibit such things as might be declared therein to be
njust discriminations.

If this last argument of counsel's about the title being merely
leclaratory of the common law be correct, then, under said title, the
ct legally could probably have contained no provision whatever
gainst discriminations between localities in the State, but its pro-
visions legally would probably have been restricted to dis-
108 criminations between individuals, for the reason that
the common law probably does not require equality
etween localities. [Beale & Wyman on Railroad Rate
Regulation, sec. 831.] These authors say in part, speaking
of the common law: "While discrimination in rates be-
tween individuals is illegal, even if the higher rate is rea-
sonable in itself, this is not true as to discrimination between locali-
ties. If a general rate charged to all shippers in a certain place is
reasonable in itself it is not rendered illegal merely because ship-
pers in another place are charged a lower rate."

A contrary view seems to be expressed in C. & A. Railroad v.
People, 67 Ill. 11, but the view of said authors appears to be sus-
tained by Interstate Com. Com'n v. B. & O. Railroad, 145 U. S.
263, 275, supra, where it is said in part that prior to the enactment
of the Interstate Commerce Act the principles of the common law

demand little more than that common carriers "should carry * * * in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable," and that "it was even doubtful whether they were bound to make the same charges to all persons for the same service; though the weight of authority in this country was in favor of equality of charge to all persons for similar service."

If, therefore, the contention of defendant's counsel in this respect is correct, and if the common law forbids only unjust discrimination between individuals, and not between localities at all, then logically it would follow, as stated above, that the word "discrimination" in the title of said act referred only to discrimination between individuals, and that the act legally could not have prohibited any discrimination between localities.

Indeed this view was suggested in one of the opinions in Division. It was suggested in said opinion that the things pro-
109 hibited by the act are not discriminations at all. This view is not sound.

The entire subject of discrimination by railroads is one of very recent growth. This is true of discrimination between individuals as well as of discrimination between localities. On account of the uncertainties and the insufficiencies of the common law upon the subject, many of the states have adopted and enacted laws, constitutional and statutory, prohibiting and regulating discriminations, both local and individual. It is said that in more than twenty-eight states local discrimination is now forbidden. [Beale & Wyman on Railroad Rate Regulation, sec. 1211.] It is entirely clear that courts, law-writers, legislatures and constitutional conventions speak of discrimination between localities in the same sense that they do of discrimination between persons. And I am entirely clear that the word "discrimination" in said title applied to local as well as individual discrimination, and included what is known as a short-haul regulation.

The title was not declaratory of the common law.

It is, of course, not disputed that, under such a constitutional provision as that of the Constitution of 1865, the body of an act must not be broader than its title. As said by Judge Cooley, the title is the conclusive index to the legislative intent. And accordingly it has been held by this court that, under a title, "An Act to change the penalty for disturbances of the peace," the Legislature could not make that a disturbance of the peace which was not previously such an offense. This case has been urged quite vigorously by defendant's counsel in support of their contention. But there was nothing in the title of the Act of 1872 to indicate a purpose to merely provide penalties for discriminations. The words of the title, "An Act to prevent unjust discriminations," etc., cannot be restricted to the mere imposition of penalties, but clearly extend to the pro-
110 hibition of things as well as to the imposition of penalties for doing the things. And there is nothing in said words restricting the body of the act to existing unjust discriminations.

The title was broad enough to include every unjust discrimina-

ion, whether unjust in law prior to the enactment or not, and broad nough to authorize the Legislature to declare unjust discriminations :hich previously had been tolerated under the law. The provisions f the act made the things prohibited unjust discriminations, and hus said provisions were fully covered by the title.

This must be true unless the words of the title be held to have ntended to make the question as to whether a discrimination is njust a judicial question, and to restrain the Legislature in said act rom declaring any discrimination unjust. This is but another way f stating counsel's contention hereinbefore already stated. There is nothing in the words of the title from which such intention can be inferred.

In my opinion the body of the act in no sense can be said to be broader than its title. The title indeed is broader than the body of the act. The title applies to and includes every unjust discrimination, while the body of the act covers only three specified acts of unjust discrimination.

Said act, title and all, was substantially a copy of a statute of Illinois enacted in 1871. The only difference between the two was in the penalties imposed. The Illinois statute provided for a forfeiture of the franchises of the guilty railroad company, while our act did not. This difference is immaterial here.

The Supreme Court of Illinois in 1873, after our Act of 1872 had been enacted, decided that the Illinois statute was unconstitutional (C. & A. Railroad v. People, 67 Ill. 11), and that decision is urged as strong and persuasive, though not controlling
111 authority, in support of the objection now under consideration. But in that case it was not decided that the Illinois statute was unconstitutional on account of any defect in its title. The invalidity was placed upon entirely different and broader grounds. The Constitution of Illinois contained a provision which the court construed to restrict the power of the Legislature to prohibit discriminations to those which are unjust, and to make the question of the injustice of any alleged unjust discrimination a judicial question to be decided by the courts. The court held that under that constitutional provision the Legislature had no power to declare anything to be an unjust discrimination, that the Illinois statute did declare the prohibited things to be unjust discrimination, and, therefore, that said statute was in conflict with the Constitution, and void. In discussion the court said that the Legislature had power to prohibit only unjust discriminations, and that said act prohibited just and unjust discriminations, but the gist of the decision was as just stated, to-wit, that the constitutional provision made the question of the injustice of every discrimination a judicial question, to be decided by the courts and not by legislative enactment. Nothing was said by the court about the title of said statute, except that in the course of argument the court remarked that said title indicated the purpose of the Legislature to follow the Constitution and to prohibit unjust discriminations only, but that the statute had gone further. The point was not made in that case, nor did the court intimate that the title was defective because not broad enough to cover

the provisions of the statute, upon the assumption that the Legislature of Illinois had the power to declare the things mentioned therein to be unjust discriminations. The inference is quite strong that all parties concerned thought the question involved in said case to be one of power on the part of the Illinois Legislature, and
112 not of form or mode of executing said power.

There is nothing in that case, in my opinion, opposed to the conclusion hereinbefore stated, that the title, "An Act to prevent unjust discrimination," etc., is broad enough to include all things which the Legislature may legally prohibit as unjust discrimination

At the time of the passage of our Act of 1872, the Constitution then in force contained no provision limiting the power of the Legislature to prohibit discrimination by railroads.

III. Defendant's counsel next object that if the Act of 1872 was not unconstitutional as passed, it subsequently became unconstitutional upon the adoption of our present Constitution in 1875, for the reason that the provisions of said act are in conflict with certain provisions of said Constitution.

If said act is in conflict with said Constitution, it became inoperative upon the adoption of the Constitution. Section 1 of the schedule which forms a part of that Constitution so provides.

The constitutional provisions referred to as the basis of said objection constitute section 14 of article 12 of our present Constitution, and read as follows:

"Railways heretofore constructed, or that may hereafter be constructed in this State, are hereby declared public highways, and railroad companies common carriers. The General Assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this State, and shall from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on said railroads, and enforce all such laws by adequate penalties."

Those provisions were borrowed literally from the Illinois Constitution of 1870, and it was those provisions that the Supreme
113 Court of that state, in 1873, in C. & A. Railroad v. People, 67 Ill. 11, construed to limit and restrict the power of the Legislature to prohibit discriminations by railroads and other common carriers to those discriminations which are unjust, and to make the question of the injustice of any alleged unjust discrimination a judicial question to be decided by the courts.

It is urged that we adopted the provisions with the construction that had been placed upon them. The general rule is that where one state borrows a constitutional provision from another state that had previously been construed by the courts of the latter state, such construction is presumed to have been adopted along with the provision. The reason for said rule is that if it were intended to exclude the previous construction, the legal presumption is that the terms of the provision would be so changed as to effect that intention. [Com. v. Hartnett, 3 Gray (Mass.) 450; Pennock v. Dia-

ogue, 2 Pet. (U. S.) 1; Hogg v. Emerson, 6 How. (U. S.) 483.] And if we had adopted those provisions of the Illinois Constitution alone without more, there would have been great force in the contention that the effect of it was to repeal the Act of 1872, although it is apparent that the question even then would have been quite different from that which would have been presented had we first adopted said constitutional provisions, and afterwards enacted the Act of 1872. In the latter contingency, the presumption would have been very great that by adopting said constitutional provisions it was our intention to prevent the enactment of such an act as the Act of 1872, and to prevent the Legislature from defining unjust discrimination, and to permit it to prevent only such discrimination as the courts might decide to be unjust. But the Act of 1872 was enacted before our adoption of said constitutional provisions and said act was within the power of our Legislature at the time
114 of its enactment, and it declared specific acts of discrimination to be unjust and unlawful; and had said constitutional provisions, standing alone, been adopted by us, the question then would have been as to the effect of the use of the word "unjust" in said provisions to set aside the policy of this State as declared in said act, and to repeal it because declaring specific acts of discrimination unjust without regard to the decisions of the courts thereon. It is clear that the two questions suggested here are not identical, and that they would not necessarily require the same answer. In the one case the presumption would be much greater than in the other.

But we did not adopt those constitutional provisions alone. Not only did we adopt as a part of our present Constitution said provisions which annulled the Illinois statute, that had enacted the short-haul rule, but we also adopted the very gist of that statute, i. e., the short-haul rule itself, and wrote that very rule into our Constitution, making it section 12 of article 12 thereof. Said section reads as follows:

"It shall not be lawful in this State for any railway company to charge for freight or passengers a greater amount, for the transportation of the same, for a less distance than the amount charged for any greater distance; and suitable laws shall be passed by the General Assembly to enforce this provision; but excursion and commutation tickets may be issued at special rates."

That action was most significant. The Illinois court had decided in 1873 that the Illinois statute prohibited all discrimination by railroad companies in the transportation of freight in any direction, the same or not; under any circumstances or conditions, similar or dissimilar; and whether just or unjust in the opinion of the courts. The convention that framed our Constitution of 1875, with that decision before it, took the gist of that statute and inserted
115 it into our Constitution, establishing the short-haul rule, but extending it to the transportation of passengers as well as that of freight. That action is consistent only with the intent on the part of the convention that framed the Constitution, to establish the short-haul rule in this State as a part of its fundamental law.

Moreover, in 1873, Pennsylvania had adopted a new Constitution, a section of which prohibited undue or unreasonable discrimination in charges or facilities for the transportation of passengers or freight and provided that "persons and property transported over any railroad shall be delivered at any station at charges not exceeding the charges for transportation of persons and property of the same class, in the same direction, to any more distant station." [Art. 17, sec. 3.] Two years afterwards when we framed our present Constitution, with the recent constitutions of both Illinois and Pennsylvania before us, we took the short-haul rule, but we worded it in our own way, following in a general way the Illinois statute, ignoring the limitations in the Pennsylvania Constitution restricting the rule to hauls in the same direction, and making it apply to hauls in the same or the opposite direction. Since 1875 other states have adopted constitutions making a short-haul provision a part of them. Said states are Arkansas, California, Kentucky, Montana, Oklahoma, South Carolina, Virginia and Washington. In none of them is the short-haul rule stated so broadly or unconditionally as in our Constitution. In most of them the haul must be in the same direction, in some of them under the same or like conditions and circumstances, and in not a few of them some state commission is authorized to grant relief from the rule on a proper showing.

The language of our Constitution, so widely different from all others in these respects, was not a mere accident, but indicates a fixed and settled purpose and intention to establish a vigorous and
116 unalterable and unvarying short-haul rule as the policy of the State.

The effect of making the short-haul rule a part of our Constitution was to exclude the construction by the Illinois Supreme Court of the Illinois constitutional provision borrowed by us.

The two sections of our Constitution should be read together in determining their meaning, their purpose and their effect. We should also consider the condition of the law at the time we adopted said Constitution. At that time the Constitution of 1865 was in force. That Constitution, as hereinbefore said, contained no restriction upon the power of the Legislature over discrimination in railroad rates, and, under that Constitution, said power was unlimited unless restricted in some manner by the Constitution of the United States. "The governments of the states possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people. The reservations by the people are shown in the prohibitions of the constitutions" of the states. The state constitutions are not grants of power, but are restrictions on the pawers which the state government would otherwise possess. [Munn v. Illinois, 94 U. S. 113; State v. Tower, 185 Mo. 79; Ex parte Roberts, 166 Mo. 207, 212; State ex rel. v. Sheppard, 192 Mo. 497, 506; Ex parte Berger, 193 Mo. 16.] The legislature of a state possesses all legislative power except as restricted by the provisions of the Constitution of the United States or of the Constitution of the state. This fundamental rule of our state governments is declared by section 1 of article 4 of our present Constitution in the

rovision: "The legislative power, subject to the limitations herein ontained, shall be vested in a Senate and House of Representatives be styled 'The General Assembly of the State of Missouri.'"

In State v. Tower, 185 Mo. 79, this rule is stated, and it is
117 said that under said rule "the Legislature has the power to declare places or practices * * * public nuisances, although not such at common law," that is, to "declare that a nuisance which before was not a nuisance."

The regulation of railroads is within the legislative power of the tate. [Beale & Wyman on Railroad Rate Regulation, secs. 1301-306; Munn v. Illinois, supra; C., B. & Q. Railroad v. Iowa, 94 U. S. 55; Peik v. Railroad, 94 U. S. 164.] It was in the exercise of that ower that the Legislature passed the Act of 1872.

Sections 12 and 14 of said article of our Constitution when read ogether, as they should be, leave no doubt of the intention of its framers to adopt the short-haul rule, and to put it in operation in this State. Such intention, as hereinbefore stated, is clearly manifested in section 12, and there is nothing in section 14 indicating a contrary intention. The language of the latter section that is supposed to indicate a contrary intention is that which directs the Legislature to pass laws "to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs in this State." It is argued that an implied restriction arises from that language limiting the power of the Legislature to prevent only such discrimination as is unjust, that it could not have been intended to thus restrict the power of the Legislature in section 14, and in section 12 to have empowered the Legislature to enforce the short-haul rule not only where it is just to do so, but also where it is unjust to do so, and, therefore, that said implied restriction should be extended to section 12 and applied to it as well as to section 14.

The implied restriction upon the power of the Legislature thus sought to be enforced, arises from language in section 14 which refers to discrimination generally, whereas the short-haul rule
118 established by section 12 applies to a particular class of discrimination, and is specifically established in positive and explicit terms. If there is any inconsistency between the two sections in the respect under consideration, the specific class of discrimination treated of in section 12 must be regarded as withdrawn from the provisions of section 14 relating to discrimination generally, and the positive and explicit terms of the former section cannot be restrained by such implication arising from the subsequent general words of the latter section.

The following statement of the established rule as to the controlling effect of a particular enactment over a general enactment, in the construction of statutes, fits this case: "It is an old and familiar rule that where there is in the same statute a particular enactment and also a general one, which in its most comprehensive sense would include what is embraced in the former, the particular enactment must be operative and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment." [26 Ency. Law (2 Ed.),

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629.] Generally "if two provisions are irreconcilably repugnant, the last in order of time and local position will be preferred," but this general rule gives way where the first provision is particular and the last one is general. In such case an exception is made, and the particular intent prevails. [8 Cyc. 743.] In speaking of the effect that positive and explicit provisions have to deny an implication from subsequent words, Mr. Chief Justice Marshall said in Faw v. Marsteller, 2 Cranch (U. S.) 10: "In searching for the literal construction of an act it would seem to be generally true that positive and explicit provisions, comprehending in terms a whole class of cases, are not to be restricted by applying to those cases an implocation drawn from subsequent words unless that implication be very clear, necessary and irresistible."

119 If there is any implied restriction upon the power of the Legislature over discrimination in railroad rates, arising from the general provisions of section 14, the short-haul rule, established specifically by the positive and explicit provisions of section 12 must be excepted from said implied restriction.

But no such implied restriction arises from the provisions of section 14.

The construction of the language of said provisions by the Illinois court was rejected by us, and rejected in toto, and those provisions should be construed in the light of the general rules that govern in the construction of constitutional provisions.

Constitutional limitations upon the legislative power may be made, it is true, either expressly or by implication, but the implication must at least be clear and strong and convincing (Town of Danville v. Page, 25 Gratt. 9; Whitlock v. Hawkins, 105 Va. 242, 248), if not absolutely necessary (Cooley's Const. Lim. [6 Ed.] 201, 204).

If section 14 be construed in the light of that rule, and of the fundamental rule that the provisions of a State Constitution are not grants of power, but limitations of power, there can be no serious doubt about its meaning.

That portion of said section that relates to the subject of discrimination reads as follows: "The General Assembly shall pass laws to * * * prevent unjust discriminations * * * in the rates of freight and passenger tariffs on the different railroads in this State."

Those words are a mandate to the Legislature to prevent unjust discriminations in railroad rates, and are not a limitation upon its power to prevent such discriminations as it may deem proper to prohbit. A constitutional command to the Legislature to do one thing is not a denial of its power to do other things.

120 In Evers v. Hudson, 36 Mont. 135, it was held that a constitutional provision requiring the Legislature to establish free common schools is a mandate to the Legislature to establish such schools, and is not a limitation upon the power of the Legislature to establish other schools. The court said that the provision "is not a limitation upon the legislative power, but is a solemn mandate to the Legislature."

In State v. Fountain, 69 Atl. 926 (Del. Gen'l Sess. 1908), it is

eld that a constitutional requirement that certain questions shall e submitted by the Legislature to a vote of the people, is not a limitaion upon the power of the Legislature to submit other questions to a ote of the people.

To the same effect is the separate concurring opinion of Justice Willard in Barto v. Himrod, 8 N. Y. (4 Seld.) 483, 493, in which ie said: "And I do not mean to lay much stress upon the implication rising from the express provision to submit a law creating a debt o the people, and the silence of the Constitution in relation to submitting to the people other matters of legislation. The maxim, expressio unius est exclusio alterius, is more applicable to deeds and ontracts than to a constitution, and requires great caution in its aplication in all cases."

The Constitution of Pennsylvania provided: "The Legislature shall, as soon as conveniently may be, provide by law for the establishment of schools throughout the State, in such manner that the poor may be taught gratis." An act of the Legislature establishing a school system was attacked on the ground that it violated that provision of the Constitution. In answer to the objection raised, Chief Justice Black, who wrote the opinion of the court, pointed out the fundamental difference between the Constitution of the United States and the constitutions of the states, i. e., that the former is a grant of powers, while the latter are limitations of power, and, after quoting the above section of the State Constitution, added:

121 It seems to be believed that the last clause of this section is a limitation to the power of the Legislature, and that no law can be constitutional which looks to any other object than that of teaching the poor gratis. The error consists in supposing this to define the maximum of the legislative power, while in truth it only fixes the minimum. It enjoins them to do thus much, but does not forbid them to go beyond it."

In Williams v. Mayor of Detroit, 2 Mich. 560, 563-564, the court held that though the maxims expressio unius est exclusio alterius and expressum facit cessare tacitum generally apply to the construction of all instruments and laws, there are certain laws to which the maxims cannot be strictly applied without doing violence to the plain intent of the framers of the laws, and that this is especially true in the construction of state constitutions, owing to their character and objects, which the court explained at some length, and then, in effect, said that the imposition by the Constitution upon the Legislature of certain specific duties, limitations, restraints and regulations in certain important particulars, binds the Legislature, of course, in those particulars, but that notwithstanding that, all other acts properly pertaining to the legislative power of the state are within the competency of the legislative department, and binding upon the people.

The maxims mentioned in the case last cited have been, by all who make it, counsel and members of this court, invoked as the chief support for the contention that said portion of section 14 limits the power of the Legislature. But those maxims are not rigid rules of unvarying and universal application; they are merely rules adopted for the construction of written words, and like all such rules, are

intended to be used for the purpose of ascertaining the true meaning of the words, in order that the purpose intended may be accomplished, and should never be permitted to obscure that meaning or thwart that purpose. [Lexington v. Commercial
122 Bank, 130 Mo. App. 687, 692; McFarland v. Railroad, 9 Mo. App. 336, 342; Brown v. Buzan, 24 Ind. 194, 198; Scott v. Laporte, 162 Ind. 34, 54; Multnomah v. Guarantee Co., 46 Ore. 523, 537; State v. Houghton, 142 Ala. 90, 97; Wheeling Railroad v. Railroad, 72 Ohio St. 368, 385; Swick v. Coleman, 218 Ill. 33, 40; Helm v. Grayville, 224 Ill. 274, 278-279; Portland v. Tel. Co., 103 Me. 240, 249; Campbell v. Skinner Mfg. Co., 53 Fla. 632, 640; Endlich on Interp. Stat., secs. 398-399, 533 and 535; 1 Story on the Const. (4 Ed.), sec. 448; Potter's Dwarris on Stats. and Consts., p. 48; 2 Ency. Law (2 Ed.), 604; Jameson, Const. Conv. (4 Ed.), sec. 574; Brown's Legal Maxims (7 Am. Ed.), p. 653; Saunders v. Evans, 8 H. L. Cas. 729; Eastern Archipelago Co. v. The Queen, 2 El. & Bl. 878, 879; Hon. Joel Parker, Deb. Mass. Conv., 1853, vol. 1, p. 153.

In 1 Story on the Constitution (4 Ed.), sec. 448, in speaking of said maxims, Judge Story says: "These maxims, rightly understood and rightly applied, undoubtedly furnish safe guides to assist us in the task of exposition. But they are susceptible of being applied, and indeed are often ingeniously applied, to the subversion of the text and the objects of the instrument. Thus it has been suggested that an affirmative provision in a particular case excludes the existence of the like provision in every other case, and a negative provision in a particular case admits the existence of the same thing in every other case. Both of these deductions are, or rather may be, unfounded in solid reasoning. Thus it was objected to the Constitution that, having provided for the trial by jury in criminal cases, there was an implied exclusion of it in civil cases. As if there was not an essential difference between silence and abolition, between a positive adoption of it in one class of cases and a discretionary right (it being clearly within the reach of the judicial powers confided to the
123 Union) to adopt or reject it in all or any other cases. Or might with just as much propriety hold that because Congress has power 'to declare war,' but no power is expressly given to make peace, the latter is excluded; or that, because it is declared that 'no bill of attainder or ex post facto law shall be passed' by Congress, therefore Congress possesses in all other cases the right to pass any laws. The truth is that, in order to ascertain how far an affirmative or negative provision excludes or implies others, we must look to the nature of the provision, the subject-matter, the objects and the scope of the instrument. These, and these only, can properly determine the rule of construction."

Lord Chancellor Campbell said in Saunders v. Evans, supra, that said maxims are not of universal application, but depend upon the intention of the parties as discoverable upon the face of the instrument or of the transaction.

Judge Parker said in the Constitutional Convention of Massachusetts of 1853, supra: "I do not understand the principle to be that

the mention of one mode excludes all other modes which would have existed but for the mention of that mode."

These authorities fully sustain my construction of the portion of said section 14 of the Constitution quoted above. That portion of said section was not intended as a grant of power to the Legislature to prevent discrimination in railroad rates, the Legislature already possessed that power; but the Legislature, with the single exception of the Act of 1872, had never exercised it, and that part of said section was adopted as a command to the Legislature to further exercise it, and to enact laws to prevent all unjust discriminations in such rates. The use of the word "unjust" was not made to limit the power of the Legislature in that regard, but to require the exercise of said power. It was not intended by said word to deprive the Legis-
124 lature of the power of determining by statute what should be unjust discrimination, and to make that a judicial question for the decision of the courts, which otherwise the Legislature could have finally settled, but it was intended to require the Legislature to act, and to declare what should be unjust discrimination. The action of the Legislature was still to be final and conclusive, just as it would have been before, and discrimination which the Legislature should prohibit, in the meaning of that section of the Constitution, would be unjust and illegal.

On the other hand, if the Legislature should enact that any given discrimination might be practiced by the railroads except that prohibited by section 12 of said article, such discrimination would be legal, and the courts could not declare it unlawful on the ground that it was unjust, and therefore prohibited by the provisions of said section 14.

It is suggested that the clause of said section 14 that requires the Legislature to pass laws establishing reasonable maximum rates for railroads is against the above conclusion, for the reason that said clause clearly was intended not only to require such legislation, but also to limit the power of the Legislature in that regard to fixing rates that are reasonable, and to prohibit it from fixing rates that are below what are reasonable; and that if such limitation and prohibition were intended in relation to rates, like limitation and prohibition were intended as to discrimination, and that the Legislature cannot prevent just discrimination any more than it can prevent reasonable rates.

I do not think that section 14 can be construed to limit or restrict the power of the Legislature in regard to rates. That section clearly was intended to require the Legislature to fix such maximum rates for railroads as it might deem reasonable, and there was no intima-
tion contained in said section that the reasonableness of the
125 rates fixed by the Legislature should be a judicial question to be determined by the courts. At common law common carriers are required to make reasonable charges, and extortionate charges can be restrained by the courts, and at common law, therefore, the reasonableness of charges is a judicial question, but the State in its sovereign capacity has the power to fix rates and to authorize them to be charged, and to place them beyond the power of

the interference of the courts on the ground that they are extortio
ate. Statutory rates, except for some constitutional or statutory pr
vision so authorizing, cannot be adjudged by the courts to be exto
tionate. Rates established by the Legislature under said section
cannot be adjudged extortionate by the courts.

There are constitutional limitations upon the power of the Leg
lature to regulate rates, but they are not found in said section 14.

It is now firmly established that the provision of the Fourteen
Amendment to the Constitution of the United States that forbids t
taking of private property without due process of law, prohibits t
State from confiscating the use of the property of any public servi
corporation by fixing rates so low as to deprive such corporation
reasonable compensation for such use, and that the reasonablene
of the compensation is a judicial question. [Chicago, etc., R. R.
Minnesota, 134 U. S. 418; Chicago, etc., R. R. v. We
man, 143 U. S. 339; Regan v. Trust Co., 154 U. S. 362; S
Louis, etc., R. R. v. Gill, 156 U. S. 649; Covington Turnpike Co.
Sandford, 164 U. S. 578; Smyth v. Ames, 169 U. S. 466; Sa
Deigo Land Co. v. National City, 174 U. S. 739; Cotting v. Sto
Yards Co., 183 U. S. 79; Stanislaus County v. San Joaquin Co., 19
U. S. 201; Ex parte Young, 209 U. S. 123; Knoxville v. Knoxvil
Water Co., 212 U. S. 1; Willcox v. Consolidated Gas Co., 212 U.
19.]

In all of those cases the plenary power of the State to reg
126 late the rates of public service corporations is fully recognize
but it is held that such power is so limited and restricted b
said provision of the Federal Constitution that, in the exercise of
the State cannot take the use of the property of such a corporati
for the public without just compensation, and in all those cases it
conceded that the rates established by the State, subject to th
exception, are controlling and beyond the interference of the cour
The patrons of the public service corporation cannot complain th
the statutory rates are too high. In that regard the reasonablene
of the rates is conclusively established by legislative enactment. Th
corporation is not bound by the established rates simply because
has the right to receive reasonable compensation for the use of i
property under a requirement to that effect by the Federal Constit
tion, and the right to a decision of the courts as to whether that r
quirement has been complied with. Just as the question of th
reasonableness of the compensation in all cases where private pro
erty is taken for public use, is a judicial question, and regardless
the form of the proceeding in which said question arises, the proce
ing is judicial and removable as such to the Federal courts. [Ma
isonville Traction Co. v. Mining Co., 196 U. S. 239; Mason City R.
v. Boynton, 204 U. S. 570.] But except for that constitutional r
quirement, the reasonableness of such rates is purely a legislati
question.

A like restriction, of course, is imposed upon the power of t
Legislature to establish rates by sections 20 and 21 of article 2 of o
Constitution, which prohibit the taking of private property witho
just compensation, and section 30 of said article, which provides th

no person shall be deprived of his property without due process of law. What has just been said about the restriction upon such power imposed by the Federal Constitution applies to those pro-
127 visions of our own Constitution. Their effect is to make the reasonableness of such rates a judicial question only when the rates are attacked by the corporation as confiscatory.

The constitutional limitations mentioned cannot be held to protect railroad companies in making any given discriminations prohibited by the Legislature, on the ground that they are just, unless it can be maintained that the refusal of the State to permit said discriminations is in effect the confiscation of the railroads or of the use thereof. It is perfectly clear that no such position can be maintained. It is not such confiscation for the State to establish and enforce a uniform and rigid rule of equality in rates between all individuals and localities, without exception and regardless of differences in conditions. Such a rule may be unwise, and may result in inconvenience and injustice, and may even destroy and prevent, in many instances, the equality sought to be enforced by the rule itself. But in no sense is it the taking of the property of the railroads.

Therefore, if section 14 of said article of the Constitution stood alone, and not with section 12, I should hold that it created no limitation upon the legislative power of the State.

Mention, however, should be made of the case of W. U. Tel. Co. v. Pub. Co., 44 Neb. l. c. 335, wherein a constitutional provision similar to that of Illinois was given the same construction as that given by the Illinois court. The Nebraska court held that had there been no such provision in the Constitution of that State, the Legislature would have had power to prevent any discrimination, but that said provision, on the principle of the maxim, expressio unius, etc., must be held to limit the power of the Legislature to the prevention of unjust discriminations, that is to say, to discriminations adjudged by the courts to be unjust. For the reasons hereto-
128 fore given I am of the contrary opinion.

But the two sections must be construed together, and construed together there is no doubt about the matter, in my mind.

There is nothing in the opinion of Judge Napton in Sloan v. Pacific Railroad, 61 Mo. 24, inconsistent with any of the views expressed herein. There is not even a dictum contained in said opinion against any of these views. The only point decided in that case was that the railroad company had a valid contract authorizing it to regulate its rates until a fixed date that had not yet arrived. What is supposed to be a dictum against the power of the Legislature to enact the Act of 1872 against railroads generally is the expression of Judge Napton: "The Act of 1872 undertakes to define the obligations of railroad companies and to declare that a charge for one distance, if it exceeds a charge for a longer one, is an unjust discrimination. It may be so; but whether it is or not, is a question for the courts to decide and not the Legislature. The Act of 1872 declares that such discrimination is an unjust one, without regard to any circumstances whatever." That expression should

not be read separate and apart from its context. The very next words of Judge Napton show that he meant to say that the common law rule declared by him in said expression, and not the Act of 1872, was in force as to the Pacific Railroad Company because of said contract. Continuing, Judge Napton said: "In other words, the Legislature, by this act, assumes a power which the charter had originally granted to the company, and which the Act of 1868 had continued to confide in the company for ten years after the passage of that act, and the only question is whether the Act of 1868, under which this road is now held, is a valid act; for if it is, then primarily, the defendant is invested with the power
129 to fix its rates of freight and passage, subject to such police regulations as the State always retains power to make." Judge Napton then proceeded to discuss the question of the police power of the State as affected by said contract, and in effect held that the Legislature could not, as against the Pacific Railroad, until after the expiration of said contract, abrogate the principles of the common law applicable to discrimination by railroad companies. He said that any citizen had the right to hold the company liable for unjust discrimination, but that the Legislature had no power to pronounce unjust certain discriminations made by the company, because of said contract with the company, and in conclusion said: "An arbitrary rule was adopted by the Legislature determining that certain rates were unjust. Whether they were so or not was a matter depending on circumstances, of which the Legislature were not made judges. The liability of the defendant at common law and on general principles not abrogated by the Legislature [because of said contract], was a matter for the determination of courts of justice with the aid of juries." There was in all this no intimation that had there been no contract, the Pacific Railroad would not have been bound by the Act of 1872, or that the Legislature was without power to enact it.

I have not considered the policy of the Act of 1872. Because it must be axiomatic in every government existing under a written Constitution, that every rule clearly established by the Constitution ought to be enforced by the courts in its true spirit without regard to their opinion of the wisdom of the rule. The people make the Constitution. They alone can amend or repeal it, and the courts would interfere with the people's prerogative were they by unfriendly construction to limit or hinder the enforcement of any constitutional rule according to its true spirit. Courts have
130 said that such a construction of a constitutional provision should not be made as would lead to unjust and inequitable consequences, or to a manifest absurdity. [Fusz v. Spaunhorst, 67 Mo. 256.] But where the meaning of the constitution is plain and unequivocal, and its intention clear and unmistakable, the courts have nothing to do with the policy of the rule established, and they should accept the spirit of the rule as well as its letter, and enforce it as if they believed in its wisdom. There should be no half-hearted support of the Constitution or half-hearted enforcement of its commands by the courts. The mandates of the constitution

ıould be regarded by the courts, established under its provisions, ; sacred, and should be enforced zealously. This court has said, ı speaking of the power of the courts to construe constitutional rovisions: "In exercising that power the courts should take a large ıd comprehensive view of constitutional language, mindful that very scripture is to be interpreted by the same spirit which gave forth,' and with a deep desire to enforce its full and exact meanıg." [Wells v. Railroad, 110 Mo. l. c. 297.]

In Hill v. Chicago, 60 Ill. 86, 91, the court said: "When a parcular act is inhibited by the clear and unambiguous language of he Constitution, the policy of such inhibition, or the inconvenience hat may ensue from its enforcement, is a matter with which the ourt has no concern; its duty is simply to reverently recognize and aithfully enforce."

IV. It is next insisted that the Act of 1872, and section 12 of rticle 12 of our Constitution, construed as above, are in conflict vith article 5 and section 1 of article 14 of the amendments to the Constitution of the United States.

The Fifth Amendment relates only to acts of Congress, and therefore is not in point.

Something was said in the preceding paragraph hereof
131 in relation to the due process of law required by the Fourteenth Amendment, but something further should be said ıpon the subject. Defendant's counsel contend that the railroads ıave the same constitutional right to a decision of the courts upon he question as to what is just discrimination that they have upon he question as to what is reasonable compensation for property aken for public use or for the use of property already devoted to he public use.

In L. & N. Railroad v. Kentucky, 183 U. S. 503, the Supreme Court of the United States denied a like contention, and held that, in the absence of a valid agreement protecting it from interference on the part of the State in this regard (if indeed such an agreement could be made, which was not decided), a railroad company has no constitutional right to discriminate either between individuals or localities, and that the State has the constitutional power to prohibit absolutely all such discriminations. In small part the court said: "It is said that, while it is true that railroad companies receive their rights to exist and to maintain their roads from the State, yet their ownership of such roads is property, and, as such, is protected from arbitrary interference by the State. But though it be conceded that ownership in a railroad is property, it is property of a kind that is subject to the regulations prescribed by the State. * * * What we now say is that a state corporation voluntarily formed cannot exempt itself from the control reserved to itself by the State by its Constitution, and that the plaintiff in error, if not protected by a valid contract, cannot successfully invoke the interposition of the Federal Courts, in respect to the long and short-haul clause in the State Constitution, on the ground simply that the railroad is property. Nor is there any foundation for the objection that the provision in question denies to the plaintiff in error

the equal protection of the laws. The evil sought to be pre-
132 vented was the use of public highways in such a manner as to prefer, by difference of rates, one locality to another, and the remedy adopted by the State was to declare such preferences illegal, and to prohibit any person, corporation, or common carrier from resorting to them. * * * The practical inefficiency of this remedy to reach the desired end, and the resulting injury to the welfare of both the producers and the consumers of an article like coal, when brought into competition with coal brought from without the State, are strongly urged on behalf of the plaintiff in error; but however well founded such objections may be, they go to the wisdom and policy of the enactment, not to its validity in a Federal point of view. The people of Kentucky, if it can be shown that their laws are defective in their conception or operation, have the remedy in their own hands." [183 U. S. 513-514.]

The court expressly denied that the doctrine established in a long line of its decisions, that a State cannot deprive a public service corporation of the use of its property under the guise of unreasonable rates, has any application to this objection. [183 U. S. 510-511.] It recognized the power of a state absolutely to prohibit all and every kind of discrimination, saying that the provision in the laws of Kentucky authorizing the exoneration of carriers from the operation of the law on certain conditions was ex gratia. [183 U. S. 515.]

V. It is next objected that the Act of 1872 was repealed by the Act of 1887, and therefore that the former act is without force or effect, even if it was valid as passed, and not afterwards invalid because violative of section 14, article 12 of our present Constitution.

This is the question upon which Court in Banc divided. I approached its consideration with diffidence on that account, but the conclusion reached, in my opinion, is reasonably free from
133 doubt. The only doubt I have is due to the difference among the members of the court upon the question.

In a former suit between these same parties it was decided in Division that the Act of 1872 was not repealed by the Act of 1887. [McGrew v. Railroad, 177 Mo. 533.] The correctness of that decision is now to be decided by the court.

The general rules that prevail in determining whether a given statute has been repealed by a later one upon the same subject have little to do with the determination of the question here, for the reason that the act of 1887 contained a section declaring its purpose and effect as related to other laws then in force. Section 21 of said act is as follows: "This act is not intended to repeal any law now in force, unless in direct conflict therewith, but is intended to be supplemental to such laws."

Said section furnishes the sole and only test for determining whether the Act of 1872 was repealed by the act of 1887. There could be no repeal by implication in the face of that express provision in the Act of 1887. There could be no repeal under any general rule for the construction of statutes in the face of the specific and

articular rule established in said act itself. There could be no epeal contrary to that declared intention of the Legislature. [Ex arte Yerger, 8 Wall. 85, 105 (opinion by Mr. Chief Justice Chase); 'atterson v. Tatum, 3 Sawy. 164, 169-170 (opinion by Mr. Justice 'ield); People v. Harris, 123 N. Y. 70 (opinion by Chief Justice Ruger); Robinson v. Rippey, 111 Ind. 112 (opinion by Judge Elliott); 1 Lewis's Sutherland, Stat. Cons. (2 Ed.), 272; 26 Ency. Law (2 Ed.), 733.]

The question, therefore, is, are the two acts in direct conflict so hat both cannot stand, or is it possible for them both to stand, and the later be treated as supplemental to the earlier?

34 It is not necessary to say that this question should be decided without any regard whatever to our views of the merits of the policy inaugurated by the Act of 1872 (Robinson v. Rippey, 111 Ind. 112); and we should take up the consideration of the question with the remark of Mr. Chief Justice Chase in mind that "addition is not substitution" (Ex parte Yerger, 8 Wall. l. c. 105).

The Act of 1887 was passed at an extra session of the Legislature called by Governor Marmaduke by a proclamation which thus stated the matters for action at such session.

"To provide the legislative enactments necessary or expedient to enforce and execute those laws and principles, with reference to railways and railroad companies, which the people themselves have enacted and declared in their Constitution." [House Journal, Extra Sess., 1887, p. 3.]

When the Legislature met, May 11, 1887, the Governor communicated a special message, in which he elaborated the program indicated in his proclamation, but did not enlarge it. He spoke of the demands expressed by the people in the Constitution twelve years previously for legislation "affecting railroads as public highways, and railroad companies as common carriers;" he declared that those demands had been too long neglected, and, without making any specific mention of what said demands were, he referred the Legislature to his recent biennial message for a statement of them.

In that message under the heading "Railroads," the Governor had called the particular attention of the Legislature to certain provisions of the Constitution in the following words:

"I call your particular attention to the following sections of article 12 of our Constitution: 'Section 7, prohibiting corporations from engaging in other business than that expressly authorized in its 135 charter,' also, section 8, fixing the conditions under which corporations may issue stock or bonds, and prohibiting all fictitious increase of stock; also, and very especially, section 14, which declares railways to be public highways, and the companies operating them common carriers; it also directs the General Assembly to pass laws to correct abuses and to prevent unjust discrimination and extortion, and to fix maximum rates and charges and 'enforce all such laws by adequate penalties;' also section 17, which prohibits the consolidation of a parallel or competing lines under one management; also, section 22, which prohibits the president and other officers of any railroad company being interested, directly or indirectly, in

furnishing material or supplies to such company; also, section 24, which prohibits railroad and other transportation companies from granting free passes or tickets 'to members of the General Assembly or members of the Board of Equalization, or any state or county or municipal officer.'"

It was in compliance with said proclamation and messages that the Legislature passed the Act of 1887, entitled, "An Act to Regulate Railroad Corporations."

It is most significant that the Governor made no mention of section 12 of article 12 of the Constitution. He called attention to six other sections of said article, but said nothing about that section. He must have been familiar with that section, and he must have been familiar with the Act of 1872, whose provisions formed a part of the Revised Statutes of 1879 (sec. 820). Having in mind the failure of the Legislature to carry out the injunctions imposed upon it by the provisions of section 14 to enact certain legislation, he surely would have said something about the legislation enjoined upon the Legislature by section 12 for the enforcement of its provisions, if he had not thought that the Act of 1872 was a sufficient enforcement of them. Whatever may be the explanation, the signifi-
136 cant fact is that the Governor made no mention of the short-haul rule covered by section 12 and the Act of 1872.

Another important fact to be borne in mind is, that the Governor's entire effort was to secure omitted legislation, not to correct defective legislation already enacted. He sought new laws; not the repeal of existing laws.

No intimation is intended that, under said proclamation and messages, the Legislature in special session could not have repealed the Act of 1872 had it deemed it proper so to do, in enacting the legislation which it had been called upon to enact; but the facts mentioned furnish strong argument in favor of the proposition that the Legislature, by the Act of 1887, did not intend to repeal the Act of 1872, but did intend to make the former act supplemental to the latter.

The Act of 1887 was quite comprehensive. It contained 21 sections. And it covered all sorts of discrimination, including both discrimination against localities and against individuals.

It is manifest that said act, so far as it concerned discrimination against individuals, was not in conflict with the Act of 1872, which was wholly confined to local discriminations. As to all individual discriminations the Act of 1887 was supplemental to the Act of 1872. No argument seems necessary to establish this self-evident proposition.

All the local discriminations covered by the Act of 1887 are discriminations under "like circumstances" or "substantially similar circumstances and conditions." The Act of 1872, as construed by everybody, ignores circumstances and conditions, and prohibits the forbidden things, regardless of circumstances and conditions. The Act of 1887 has a short-haul section, but it is confined to hauls in the same direction under similar circumstances and conditions.

[Laws 1887, sec. 4, p. 17; R. S. 1899, sec. 1134.] As herein-
7 before frequently and as just stated, the short-haul section of the Act of 1872 is not confined to any direction or circumnces and conditions, but includes all hauls in every direction and nder all circumstances and conditions. That is to say, the Act of 87 forbids a railroad company to receive "any greater compensaon in the aggregate for the transportation of like kinds of property nder similar circumstances and conditions for a shorter than a nger distance over the same line in the same direction" (Id.), hile the Act of 1872 prohibits a railroad company to receive for ie transportation of property any greater amount as compensation an is charged for the transportation of the same class of property ver a greater distance upon the same road, without regard to direcon or circumstances or conditions.

It is plain to me that there is no necessary conflict between the wo acts in regard to the short-haul clause. Both acts can stand. It s, of course, plain that anything in this regard covered by the Act f 1887 is also covered by the Act of 1872, because a haul in the ame direction and under similar circumstances and conditions, in he meaning of the former act, must be a haul in some direction and nder some conditions, in the meaning of the latter act. But that oes not create conflict. Two laws do not conflict with each other imply because they "establish the same right or provide redress for he same wrong," and in such a case, "the person seeking to enforce he right or avenge the wrong may proceed on the law he chooses." Bishop's Written Laws, sec. 163d; Robinson v. Rippey, 111 Ind. 12.] In the case last cited Judge Elliott said, among other things: 'The fact that both of the statutes are directed to the attainment of he same end does not warrant the conclusion that the later repeals he former. Statutes constructing two systems for the government of the same subject may both stand. [Beals v. Hale, 4 How. 37; Wood v. United States, 16 Pet. 342, 363; Daviess v. Fairbairn,
138 3 How. 636; Raudebaugh v. Shelley, 6 Oh. St. 307.]"

The acts of 1872 and 1887 created two systems for preventing discrimination by railroad companies. The system created by the latter act contains some but not all of the things contained in the system created by the former act, and many other things. The systems are by no means identical, and they do not conflict with each other.

What if a violation of the short-haul section of the Act of 1887 also violates the Act of 1872? The person injured by said violation can proceed under the Act of 1872, and the fact that the matter or thing complained of also constitutes a violation of the Act of 1887 will not prevent his recovery. Take the case at bar. The allegations in every count of the petition show a violation of the Act of 1872 and not of the Act of 1887, for the reason that there is, except in one count, no allegation that the longer and shorter hauls were in the same direction, and in none of the counts is there any allegation that the hauls were under the same or like circumstances and conditions. Proof of said omitted fact would not have defeated plaintiff's recovery. Such proof would have been essential to a re-

covery under the Act of 1887, but such proof would not have prevented a recovery in the case at bar, founded on the Act of 1872.

This is precisely the view taken of a similar situation by Mr. Justice Story in Wood v. United States, 16 Pet. 342, 363. The question there was whether certain sections of an act of Congress of 1830 and 1832 were repugnant to a certain section of the act of 1799. He said in part: "In truth, however, there is not the slightest repugnancy between these sections of the acts of 1830 and 1832, and the sixty-sixth section of the Act of 1799. The former apply only to cases where there has been an opening and examination of the packages imported, before they have passed from the custody
139 of the custom-house; and in the course of such examination, the fraudulent intent in the making up of the package or invoice has been detected; and thereupon it declares the same to be forfeited. Now, the sixty-sixth section of the Act of 1799 may cover the same cases, but the forfeiture is the same; and therefore the provisions in such a case may well be deemed merely cumulative, and auxiliary to each other. But the sixty-sixth section is not confined to such cases. On the contrary it covers all cases where the goods have entered, and have passed from the custom-house without any examination or detection of the false invoices. It is, therefore, much more broad in its reach. To enforce a forfeiture under the sections of the acts of 1830 and 1832, it would be necessary to allege, in the information or libel, all the special circumstances of the examination and detection of the fraud, under the authority of the collector; for they constitute a part of the res gestæ, to which the forfeiture is attached. But under the sixty-sixth section, no such allegations would be necessary or proper, as the forfeiture immediately attaches to every entry of goods falsely and fraudulently invoiced, without any reference whatever to the mode or the circumstances under or by which it is ascertained."

The fact that the penalties created by the two acts are different is immaterial. In order to enforce the penalties prescribed by the Act of 1887 for violating its short-haul section, it is necessary to allege and prove that the shorter and longer hauls were made in the same direction and under similar circumstances and conditions. Such allegations and proof would not be needed to enforce the penalty prescribed by the Act of 1872, and in a proceeding to enforce the latter penalty it would be no defense to show the facts making the defendant liable to the other penalties. Just as in a pro-
140 ceeding against one for a common assault, it is no defense to prove that the assault was felonious.

This principle has been recognized by the Supreme Court of the United States in Beals v. Hale, 4 How. 37, 53. In that case the court referred to a number of cases cited in Coke, and added: "Among them is one where an act of parliament made an offense punishable at the quarter sessions, and another pased making it punishable at the assizes, without any words of repeal. It was held that you may indict under either or at either court. [11 Coke 63.]"

For these reasons I think that McGrew v. Mo. Pac. Ry. Co., 17 Mo. 533, was correctly decided.

There was an inaccuracy in the opinion in that case which, in my opinion, was not of controlling importance. Mention of it is now made because of the importance given to it during the discussion of the present case. It was stated that section 1126, Revised Statutes 1899, which was section 1 of the Act of 1872, was passed in obedience to the mandate of section 12 of article 12 of the Constitution. The statement was made as a "cogent reason" why the Act of 1872 was not repealed by the Act of 1887. The statement was, of course, erroneous, for the reason that the Act of 1872 antedated the Constitution, but to my mind the error is of no importance. The important fact is that the Act of 1872 was deemed, in a great measure, to be an enforcement of said section 12 of article 12 of the Constitution, and it was argued that for that reason its repeal was not probable.

VI. The petition was framed upon the Act of 1872, but in view of the fact that the trial court denied the penalities asked, and allowed only the difference between the higher rates charged plaintiff and the lower rates charged by defendant for the longer distances, the judgment could be sustained upon section 12 of article 12 of the Constitution, without the aid of the Act of 1872, pro-
141 vided that said section of the Constitution is self-enforcing. Because if said section is self-enforcing, that is to say, if it, without the aid of any statutory enactment, makes it unlawful for a railroad company to charge more for a shorter haul than a longer one of the same class of property in any direction, the same or not, and under any or all circumstances and conditions, then clearly the measure of damages for doing the unlawful thing, in the absence of any statute upon the subject, is the amount of the excess charged for the shorter distance over that charged for the longer distance. [W. U. Tel. Co. v. Pub. Co., 44 Neb. 346.]

For this reason it seems important to determine whether said section of the Constitution is self-enforcing.

Much has been said by courts and text-writers upon the question as to what constitutional provisions are and what are not self-enforcing or self-executing. It is not thought necessary to go into this subject with the purpose of endeavoring to state a rule that will reconcile all the authorities or that will determine all cases that may hereafter arise.

It must be conceded by all that wherever the Constitution of a State establishes a rule creating a new right so that, had the right, as created by the Constitution, existed at common law, it could have been enforced by some common law action, then the constitutional provision is self-enforcing to the extent of authorizing its enforcement by an appropriate action at law. And it matters not that the legislature might be able to supply other and better methods for protecting or enforcing said right, or even that the Legislature should be directed by the Constitution itself to pass suitable laws for enforcing the rule established by it. If the right be clearly created by the Constitution, it can be enforced in the courts without legislative action. The courts will find a remedy, and will not
142 permit the Legislature to destroy the right by failure to act, any more than by affirmative action. Constitutional rights

are above legislative destruction or impairment, by action or non-action.

In Householder v. Kansas City, 83 Mo. 488, the question was as to the self-executing character of the following provision of our Constitution:

"Private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law; and until the same shall be paid to the owner or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested." [Const., art. 2, sec. 21.]

The court was composed of Judges Hough, Henry, Norton, Ray and Sherwood. In an opinion by Judge Henry, concurred in by all, it was held that said provision is self-executing. It was said in the opinion that the clause relating to the ascertainment of compensation was intended to authorize the Legislature to prescribe an exclusive method of ascertaining the damages, under the limitations named, but that the failure of the Legislature to prescribe any method could not be permitted to deprive the owner of the property taken or damaged for public use of just compensation; that the first clause of said section gave him an unconditional right to such compensation; that the failure of the Legislature to prescribe a statutory method for the ascertainment of said compensation affected the remedy only and not the right; and that the owner of said property could maintain an action at common law for the value of his property taken. This is in accordance with the settled rule of law that there is and can be no such thing as a legal right without a remedy for its enforcement, which Judge Henry stated in these words: "Wherever a statute or the organic law creates a right,
143 but is silent as to the remedy, the party entitled to the right 'may resort to any common law action which will afford him adequate and appropriate means of redress.'" That case has been followed and approved in the following cases, among others: Sheehy v. Railroad, 94 Mo. 574; Keith v. Bingham, 100 Mo. 300; Hickman v. Kansas City, 120 Mo. 117; Sharp v. National Biscuit Co., 179 Mo. 553; Cummings v. Winn, 89 Mo. 51. The Householder case states the recognized doctrine in this state, and the doctrine sustained by reason and the overwhelming weight of authority.

In the previous case of St. Joseph School Board v. Patten, 62 Mo. 444, it was held in an opinion by Judge Napton, concurred in by Judges Wagner, Vories, Sherwood and Hough, that our constitutional provision limiting the rate of taxation for school purposes, with the proviso that the rate might be increased in certain classes of school districts on the condition that a majority of the taxpayers voting at an election to be called to decide the question, vote for said increase, was self-executing, and that the failure of the Legislature to provide for an election on this question of such increase did not affect the self-executing character of said provision.

But in another prior case this court had rendered a decision out of line with the doctrine announced in the Householder case. In

usz v. Spaunhorst, 67 Mo. 256, the question was whether the following provision of our Constitution was self-executing so as to make the officers of the bank liable under its provisions:

"It shall be a crime, the nature and punishment of which shall be prescribed by law, for any president, director, manager, cashier or other officer of any banking institution, to assent to the reception of deposits, or the creation of debts by such banking institution, after he shall have had knowledge of the fact that it is insolvent, or in failing circumstances; and any such officer, agent or manager shall be individually responsible for such deposits so received, and
144 all such debts so created with his assent." [Art. 12, sec. 27.]

This court held in an opinion by Judge Sherwood, concurred in by Judges Napton, Hough, Norton and Henry, that the provision making the officers of the failing bank liable is not self-executing. The opinion was based largely upon the first part of the section, "It shall be a crime, the nature and punishment of which shall be prescribed by law," etc., which, of course, was not self-executing, and it was argued that neither was it intended to make the civil part of the section self-executing. Groves v. Slaughter, 15 Pet. 449, was cited among other cases in support of the court's opinion. The Fusz case is no longer recognized as the law in this State, any more than is Groves v. Slaughter recognized as having been correctly decided.

In Cummings v. Winn, 89 Mo. 51, 56, Judge Henry said that he had concurred in the opinion in Fusz v. Spaunhorst, but had become satisfied that said opinion was erroneous, citing the Householder case in support of his present conviction. Speaking of the section of the Constitution involved in the Spaunhorst case, he said that the first clause declaring "it shall be a crime, the nature and punishment of which shall be prescribed by law," etc., is clearly not self-executing, but that the last clause is. He added: "It declares the individual responsibility of the guilty officer—confers a right upon the depositor, or creditor, to recover from such officer his debt or deposit. When the law gives a right but prescribes no remedy, any common law action may be resorted to, adapted to the case, and under our code there can be no difficulty as to the remedy. We have in this State 'but one form of action for the enforcement or protection of private rights, and redress or prevention of private wrongs, which shall be denominated a civil action.' [Sec. 3641, R. S. 1879.]"

In Sharp v. National Biscuit Company, 179 Mo. 553, it was held that the amendment to our Constitution authorizing three-
145 fourths of a jury in civil cases in courts of record to render a verdict is self-executing. In the opinion in that case Fusz v. Spaunhorst was treated as having been overruled in Cummings v. Winn, 89 Mo. 51.

In State ex rel. v. Lesueur, 145 Mo. 322, it was held by a unanimous opinion by Court in Banc that the constitutional provision that "no corporation * * * shall be created or organized, * * * unless the persons named as corporators shall * * *

pay into the State Treasury fifty dollars for the first fifty thousa
dollars or less of capital stock" is self-executing.

Section 6 of article 12 of the Constitution, in relation to cumu
tive voting in corporations, has been assumed to be self-executi
Judge Gantt said in Gregg v. Granby Co., 164 Mo. l. c. 626, that s
section granted the right to each shareholder to vote on the cumu
tive plan.

In State v. Warner, 165 Mo. 399, it was held that the provisi
of the bill of Rights in our Constitution that "in criminal prose
tions the accused shall have the right to appear and defend in p
son and by counsel," is self-executing. In the opinion it was sa
in part, that "whenever a constitutional right, such as is now und
discussion, has no statute specially adapted to enforce it, by its o
inherent potency, and leaning not on the adventitious aids of st
utory regulation, it supplies the lack of statutory provisions and e
forces itself." [165 Mo. 414-415.]

In State v. Kyle, 166 Mo. 287 (in Banc), in an opinion by Jud
Burgess, concurred in by all the other judges, it was held that t
amendment to our Constitution, making indictment and inform
tion concurrent remedies in prosecutions for felonies, is self-execu
ing. Judge Burgess said that there are a number of provisions
our Constitution that are self-executing, and that require no legis
tion to put them in operation, and that the test in all ca
146 involving this question is, can the provision in question
enforced without legislation?

In Evans v. McFarland, 186 Mo. 703, 727 (in Banc), it was he
that the provision of our Constitution that fixed a maximum of i
debtedness which any municipal or political corporation or subd
vision of the State can incur, provided that such corporation or su
division can assent to an increase on indebtedness beyond said ma
mum amount, but provided further that any such corporation
subdivision shall, before or at the time of giving such assent, pr
vide for the collection of an annual tax sufficient to pay the intere
on such indebtedness as it falls due, and also to constitute a sinki
fund for the payment thereof, etc., is self-executing. To a like effe
is East St. Louis v. Amy, 120 U. S. 600.

The courts elsewhere in this country quite generally announ
the same doctrine.

The Constitution of Maryland contained the following provisio
"The rate of interest in this State shall not exceed six per ce
per annum, and no higher rate shall be taken or demanded, and t
Legislature shall provide, by law, all necessary forfeitures and pe
alties against usury."

Mr. Chief Justice Taney held on the circuit that said provisi
was self-executing, and that a note bearing usurious interest w
void in toto. [Dill v. Ellicott, Taney (U. S.) 233, 7 Fed. Cas. No.
811.] Subsequently the Court of Appeals of Maryland decided th
said provision was self-executing, but that it avoided only so mu
of the contract as provided for excessive interest. [Bandel v. Isa
13 Md. 202.] Chief Justice Le Grand said in small part: "T
thing forbidden by the Constitution is the taking or demanding

higher rate of interest than six per cent; it is not forbidden to take or demand that or a lower rate. The thing forbidden is the
147 excess and nothing else, and that is what is illegal and void, and it is within the province of the Legislature to punish this illegality by forfeitures and penalties. Whilst the Constitution makes it competent to the Legislature 'by law,' to forfeit the whole, or any part, of the money loaned, and in addition to impose a penalty, yet, until it does exercise this office, all that is 'avoided' by the Constitution is the excess beyond the six per cent." [p. 221.]

A like provision of the Constitution of Texas has been held to be self-executing, and the view of Chief Justice Taney is there taken. [Watson v. Aiken, 55 Tex. 536; Hemphill v. Watson, 60 Tex. 679; Quinlan's Estate v. Smye, 21 Tex. Civ. App. 156.]

In Hemphill v. Watson, supra, Chief Justice Willie said in part: "This provision is prohibitory in its nature and self-executing so far as to render all contracts of the kind denounced immediately illegal; and it left to the Legislature the only remaining duty of saying what penalties should be imposed upon offenders against this clause of the Constitution."

A provision of the Constitution of Illinois that the recorder's court of the city of Chicago should be continued and called the "Criminal Court of Cook County," and should have jurisdiction in all criminal cases and quasi-criminal matters arising in the county of Cook, or which might be brought before it pursuant to law, was held to be self-enforcing. [People v. Bradley, 60 Ill. 390.]

So too was the provision of said Constitution that private property should not be taken or damaged for public use without just compensation, and that such compensation, when not made by the State, should be ascertained by a jury, and should be prescribed by law. [People ex rel. v. McRoberts, 62 Ill. 38.] In the course of the opinion in the case last cited, the court quoted the words of the Constitution "as shall be prescribed by law," discussed the words somewhat, and said: "The inhibition of any other mode of de-
148 termining the compensation is independent of and complete without the words quoted. They merely declare the duty of the Legislature." The court also said, speaking of other provisions of the Constitution: "Section 12 prohibits imprisonment of a debtor, unless upon refusal to deliver up his estate, 'as shall be prescribed by law.' Does the freedom of a citizen from incarceration, therefore, depend upon the action of the Legislature? We apprehend not. He is secure from imprisonment for debt except upon a refusal to surrender his estate for the benefit of his creditors, or there is strong presumption of fraud; and until the manner of surrender is provided by law. Section 16 forbids the quartering of troops in the house of the citizen, even in time of war, 'except in the manner prescribed by law.' The failure to prescribe the manner cannot destroy the prohibition." In speaking of the same section of the Constitution of that State the Supreme Court of Illinois in a subsequent case, said: "It is a constitutional right of which the party may not be debarred, either by the action or non-action of

the Legislature." The following provision of the Constitution of Illinois has been held to be self-enforcing:

"No county, city, township, school district or other municipal corporation, shall be allowed to become indebted in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes, previous to the incurring of such indebtedness." [Law v. People ex rel., 87 Ill. 385.]

In part it was said in the opinion by Mr. Justice Walker: "It has also been repeatedly held, and is regarded as settled doctrine, that all negative or prohibitory clauses of this character found in a constitution execute themselves, as legislative provisions, in the same or other language, prohibiting the incurring of such indebt-
149 edness, could be no more binding or forcible than the Constitution itself."

A provision of the Constitution of Tennessee that "the Legislature shall have no power to authorize lotteries for any purpose, and shall pass laws to prohibit the sale of lottery tickets in this State," was held to be itself a prohibition of lotteries. [Bass v. Nashville, Meigs 421.]

In Mallon v. Hyde, 76 Fed. 388, it was held that the provision of the Constitution of Washington, making individually liable an officer of a bank receiving deposits after he has knowledge of the bank's insolvency, is self-executing. And to the same effect is Rice v. Howard, 69 Pacific 77 (Cal.), in relation to a like provision of the Constitution of California.

The double liability of stockholders of corporations established by constitutional provisions is also held enforcible without legislative enactment in aid of such provisions.

In State v. Woodward, 89 Ind. 110, the court held that the following provision of the Constitution of that State was self-enforcing: "No lottery shall be authorized, nor shall the sale of lottery tickets be allowed." In part the court said: "We are of opinion that the provision is not a mere check upon future legislation, but an absolute prohibition of lotteries and the sale of lottery tickets. It is so far self-executing as to take away any right or authority that might theretofore have existed to conduct lotteries or sell lottery tickets. Its evident meaning is that from the time of the adoption of the Constitution there should be no authority for conducting lotteries, nor should lottery tickets be sold. It needed legislation, to be sure, to make the conducting of lotteries or the selling of lottery tickets a crime with a prescribed punishment, but the provision effectually took away any authority that might have previously existed to do those things. See Cooley's Const. Lim., [4th Ed.] pp. 99 to
150 102, and notes; also the opinion by Mr. Chief Justice Sharkey in the case of Brien v. Williamson, 7 How. (Miss.) 14."

The great case on this subject is Brien v. Williamson, 7 How. (Miss.) 14. The Constitution of Mississippi provided: "The introduction of slaves into this State as merchandise or for sale, shall be prohibited from and after the first day of May, eighteen hundre

and thirty-three: Provided, that the actual settler or settlers shall not be prohibited from purchasing slaves in any State of this Union, and bringing them into this State for their own individual use, until the year eighteen hundred and forty-five." The Supreme Court of that State held said provision of the Constitution to be self-executing, and to be a prohibition of the traffic described, and that a note given in part payment for a negro imported by the payee in violation of said provision was void. The court that decided that case consisted of William L. Sharkey, Chief Justice, and Edward Turner and Alex M. Clayton, Associate Justices. Mr. Chief Justice Sharkey wrote the opinion, in the course of which he said in part: "We hold the contract void on either of two grounds. First, that the provision in the Constitution of 1832 does per se prohibit the introduction of slaves into this state as merchandise or for sale. * * * In support of our first position it is proper that we should inquire in the outset what a Constitution is, and how it operates. It is a form of government established by the people, *designated* for their general welfare as a society and as individuals. In the language of a learned jurist, 'it was made by the people, made for the people, and is responsible to the people.' It is but the frame and skeleton of a government, containing the general outline, leaving the detail to be filled up in subordination and auxiliary to the essential and fundamental principles thereby established. But it is not on that account the less binding. It is from its very nature and object the supreme law of the land, fixed and un-
151 alterable, except by the power that made it. It contains only certain great principles which are to control in all legislation, and extend through the whole body politic. These principles are of themselves laws. Constitutions do not usually profess to insure obedience by prescribing penalties; they merely declare the rule or establish the principle, which being paramount, makes void whatever is repugnant to it. Its mandates or principles bind by a moral power. * * * General principles, thought to be essential to a free government, are declared; and (emanating from the sovereign authority) that mere declaration imparts to them all the force of a supreme law. * * * We may safely assert without the shadow of a doubt, that the convention did intend that the importation of slaves into this State as merchandise, should be prohibited after the 1st of May, 1833, either by force of the constitutional provision, or by legislative enactment, and having so intended and declared it through the Constitution, it became as much a fundamental and fixed principle in the government, as any other principle or provision whatever. It became by that mere declaration, propria vigore a law, and whether it may be supposed to be defective in not providing all the means necessary to enforce the prohibition makes no difference, provided it can by any means be carried into effect. Even if it was intended only as a mandate to the Legislature, its operation was to be on the citizens generally. It was not designed as one of those provisions which expend their whole force in directing and regulating the action of the legislative body, but its design was evidently to protect the people against a supposed evil. A time was fixed at which

the evil should be prohibited; and from that time it was a law in full force. The Legislature could not defeat it by removing the prohibition, and this shows that it had an existing operative force. Having that existing operative force, it was not liable to be defeated by omission. It was one of those principles which required no
152 legislative aid to give it strength, although some may think that its strength was susceptible of a more efficient application by legislative aid. All fundamental principles, whether inherent or otherwise, in any form of government, constitute a part of the law of that government. When the people prescribe their constitutional form of government, they ordain that every part of that form must have its appropriate effect; every principle is to be regarded as fundamental and self-executing." In his great opinion (p. 21) Mr. Chief Justice Sharkey also said: "The words 'shall be,' when used by a lawmaking power, are words of enactment; they declare the law."

The Mississippi Court had taken the same view of the law in previous cases, but the Supreme Court of the United States had declined to follow the State court in the construction of the State Constitution. [Groves v. Slaughter, 15 Pet. 449.] Mr. Chief Justice Sharkey's opinion was written, in effect, in answer to the Supreme Court of the United States. Groves v. Slaughter was decided by a divided court, and the several opinions written therein show clearly that the judgment of the court was the result of the exigencies of the slavery question and to avoid the decision of grave Federal questions.

Mr. Chief Justice Sharkey's opinion was followed subsequently in cases affected by said provision of the Constitution of Mississippi, in Tennessee (Yerger v. Rains, 4 Humph. 259), and in Arkansas (Moore v. Clopton, 22 Ark. 125, 128), and its correctness, now after the slavery question has passed away forever, is, I believe, tacitly accepted by even the courts of the United States.

In Illinois Cent. Railroad v. Ihlenberg, 75 Fed. 873, in an opinion by Judge Taft, it was held that a clause of the Constitution of Mississippi which provided that any knowledge by an injured employee of the defective or unsafe condition of machinery should be
153 no defense to an action for injury caused thereby, was self-executing.

And in Davis v. Burke, 179 U. S. 399, which was an appeal from an order denying a writ of habeas corpus to appellant who had been found guilty of murder in the first degree, appellant objected to conviction on the ground, among others, that he had been illegally prosecuted by information, (1) because the constitutional provision of Idaho which in terms permitted prosecution by information was not self-enforcing, and (2) that the statute of that State, known as the Information Act, was void, because not passed in the manner requided by said Constitution. The court held that said constitutional provision was self-enforcing. Mr. Justice Brown wrote the opinion of the court. He said in part: "Where a constitutional provision is complete in itself it needs no further legislation to put it in force. * * * In other words, it is self-executing only as far as it is susceptible of execution. But where a Constitution asserts a

ertain right, or lays down a certain principle of law or procedure, it peaks for the entire people as their supreme law, and is full authority for all that is done in pursuance of its provisions. In short, if omplete in itself, it executes itself. When a constitution declares hat felonies may be prosecuted by information after a commitment y a magistrate, we understand exactly what is meant, since informaions for the prosecution of minor offenses are said by Blackstone to e as old as the common law itself, and a proceeding before magisrates for the apprehension and commitment of persons charged with rime has been the usual method of procedure since the adoption f the Constitution. It is true the Legislature may see fit to prescribe n detail the method of procedure, and the law enacted by it may turn ut to be defective by reason of irregularity in its passage. In such ase a proceeding by information might be impeached in the State court for such irregularity, but it certainly would not be void
154 as long as it was authorized by the Constitution. For us to say that the accused had been denied due process of law would involve the absurdity of holding that what the people had declared to be the law was not the law."

In Central Iron Works v. Pennsylvania Railroad, 5 Pa. Dist. 247, in an opinion by Simonton, P. J., is was held that a provision of the Constitution of Pennsylvania was self-enforcing, that declared that "persons and property transported over any railroad shall be delivered at any station at charges not exceeding the charges for transportation of persons and property of the same class, in the same direction, to any more distant station." Judge Simonton said among other things: "There are undoubtedly many provisions in the Constitution which presuppose and require legislation to carry them into effect, but there are also many, efficient in themselves, which need no aid from legislation. Of these, art. 16, sec. 4, providing for cumulative voting for directors of corporations, is one [Pierce v. Com., 104 Pa. St. 150.] Delivering the opinion of the court in this case, Gordon J., said, at p. 155: 'But it is said this provision is but directory, and it cannot go into effect without legislative action directing the manner of its exercise. To this proposition we cannot assent. * * * The constitutional right is one that belongs solely and exclusively to the individual shareholder. * * * Legislative action is, therefore, uncalled for. * * * With the right itself, the General Assembly cannot meddle.' So, here, the right conserved by the Constitution belongs to each individual shipper, and the ordinary process of the courts is ample for its enforcement. There is, therefore, no necessity for legislative action." In further part Judge Simonton said: "Nothing could be added to this [constitutional provision] by an act of the Legislature which would render it more clear or definite, and, as was said in Pierce v. Com., supra, it would
155 not be in the power of the Legislature to take anything from it." Judge Simonton further referred to the fact that the provision of the Constitution of Pennsylvania which prohibits the damaging of private property without just compensation had been held to be self-enforcing. [Reading v. Althouse, 93 Pa. St. 400; Fredericks v. Canal Co., 148 Pa. St. 317.] And that no one had con-

tended that the provision of said Constitution providing that no existing railroad, canal or other transportation company, should have the benefit of a certain article thereof, except on condition of the complete acceptance of all the provisions of said article, needed legislation to enforce it; and that no claim had ever been made that legislation was necessary to enforce that provision of said Constitution that prohibits the consolidation of competing or parallel lines of transportation.

Section 12 of article 12 of our Constitution clearly establishes an unconditional short-haul rule, without regard to direction or to circumstances and conditions. Said section declares that it shall be unlawful for any railroad company to charge for the transportation of freight or passengers a greater amount for a less distance than "the amount charged for any greater distance." That declaration establishes a rule and creates a right in every passenger and shipper to a compliance with, and an obedience to its terms. The direction to the Legislature that it pass suitable laws to enforce the rule established, contained in said section, did not suspend the rule or right of passengers and shippers to a compliance with its terms, until the Legislature should comply with said direction and pass such laws. Said section has the same force and effect as if it read: "It shall not be lawful in this State for any railroad company to charge, under penalties which the General Assembly shall prescribe, for freight or passengers a greater amount for the transportation of the
156 same, for a less distance than the amount charged for any greater distance." Had said section read that way, its effect as an operative law would have been too clear for controversy. To my mind it is equally clear under the present reading.

Something was said in argument about said section being too vague and uncertain to be self-executing. But this argument is untenable. Said section is not identical with the Act of 1872. The former includes both freight and passengers, while the latter applies only to freight; the former applies only to hauls for a greater distance, while the latter includes hauls both for a greater and the same distance; and the former applies only to the short-haul rule, while the latter includes both that rule and a provision requiring equality of rates for "receiving, handling or delivering freight at different points" on the same road. All these differences are immaterial so far as concerns the point under discussion. The words of the section of the Constitution and of the Act of 1872 in defining the greater haul are identical. Nothing is said in either indicating direction or condition and circumstances. The act has been uniformly construed, in this State and in Illinois, to mean any direction, and any and all circumstances and conditions, and therefore, if the Act of 1872 is sufficiently explicit, so too is the section of the Constitution.

In my opinion plaintiff's judgment can be sustained upon said provision of our Constitution, without the aid of the Act of 1872.

The judgment is affirmed. Gantt, Valliant and Lamm, JJ., concur; Fox, C. J., Burgess and Woodson, JJ., dissent.

WILLARD P. HALL,
Special Judge.

57 In the Supreme Court of Missouri. In Banc.

No. 12887.

JAMES C. MCGREW, Respondent,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Dissenting Opinion.

Statement.

The respondent instituted this suit in the Circuit Court of Lafayette county to recover $7,462.43, over charges and penalties alleged to be due him from appellant for its violation of certain
58 sections of the Revised Statutes of 1899, regarding freight charges, for transportation of coal from Myrick, Missouri, to various other towns in this State.

There was a trial before the court, without the intervention of a jury, which resulted in a judgment for the respondent for the amount sued for, and the appellant duly prosecuted its appeal to this court.

The facts are undisputed, and are substantially as follows:

The respondent is a coal miner and shipper at Myrick, Missouri; and appellant is a railroad corporation duly organized and incorporated under the laws of this State; Myrick and the other towns mentioned are located along the line of said railroad; respondent made divers shipments of coal over said road to the said various towns. The suit is to recover overcharges and penalties for the alleged violation of sections 1126 and 1160, Revised Statutes 1899, prohibiting railroads from exacting a higher toll for carrying freight from one point to another in the State than they charge for the same class and quantity of freight carried a greater distance. The appellant collected of respondent certain sums in excess per ton for said shipments than it did for the same class and quantity of coal shipped for longer distances, aggregating the sum sued for.

At the close of the testimony counsel for the plaintiff prayed the court to grant this instruction on the part of the plaintiff: "The court declares the law to be that upon the pleadings and the evidence herein the finding and judgment must be for the plaintiff," which was by the court given. To the giving of which instruction on the part of the plaintiff, the defendant by its counsel then and there duly excepted.

Opinion.

I.

The respondent bases his cause of action upon sections 1126 and 1160, Revised Statutes 1899, which are as follows:

159 "Sec. 1126. No railroad corporation organized or doing business in this State, under any act of incorporation or gen-

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eral law of this State now in force, or which may be hereafter enacted, shall directly or indirectly charge or collect for the transportation of goods, merchandise, or property on its said road for any distance, any larger or greater amount as toll or compensation, than is charged or collected for the transportation of similar quantities of the same class of goods, merchandise or property over a greater distance upon the same road, nor shall such corporation charge different rates for receiving, handling or delivering freight at different points on its road or roads connected therewith, which it has a right to use, nor shall any such railroad corporation charge or collect, for the transportation of goods, merchandise or property over any portion of its road, a greater amount as toll or compensation than shall be charged or collected by it for the transportation of similar quantities of the same class of goods, merchandise or property over any other portion of its road of equal distance; and all such rules, regulations or by-laws of any railroad corporation, as fix, prescribe, or establish any greater toll or compensation than is hereinbefore prescribed, are hereby declared to be void.

"Section 1160. Any railroad corporation which shall fix, demand, take or receive, from any person or persons, any greater toll or compensation for the transportation, receipt, handling or delivery of goods or merchandise, in violation of the provisions of this article, shall forfeit and pay for any such offense any sum not exceeding one thousand dollars, and costs of suit, including a reasonable attorney's fee, to be taxed by any court where the same is heard by appeal or otherwise, to be recovered by civil action by the party aggrieved, in any court having jurisdiction thereof; and any officer, agent or employee of any such railroad corporation who shall knowingly or wilfully violate the provisions of this article shall be liable to the penalties prescribed in this section."

It will throw some light upon the legal propositions involved in this suit if we will bear in mind the history of this legislation. The two sections above quoted were originally enacted in 1872, and were sections 1 and 4 of that act [Laws of 1872, pp. 67 and 70.] Without alteration they were brought forward and incorporated in the Revised Statutes of 1879, and are therein numbered sections 820 and 822, respectively. They were again brought forward without any change into the Revised Statutes of 1889, and are sections 2629 and 2665, and were in like manner brought forward into the Revised Statutes of 1899, and are now sections 1126 and 1160. Briefly stated, sections 1 and 4 of the Act of 1872 have been brought forward through all the revisions of the statutes without change down to and including the revision of 1899, and are numbered therein sections 1126 and 1160.

The appellant assails the constitutionality of those statutes for the reason that they were not enacted in accordance with the requirements of section 32, article 4, of the Constitution of 1865. That section reads as follows: "No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title; but if any subject embraced in an act be no

expressed in the title, such act shall be void only as to so much thereof as is not so expressed."

The title to the Act of 1872 is as follows: "An Act to prevent unjust discrimination and extortion in the rates to be charged by the different railroads in this State, for the transportation of freight on said roads."

The appellant contends that the title of the act is directed against unjust discriminations, while the act itself prohibits all discriminations whether just or unjust. The appellant insists that if the validity of that act is tested by the constitutional provision before quoted, then that portion of the act which prohibits all
161 discrimination is void and inoperative, for the reason it is not mentioned in the title of the act.

The title of the Act of 1872 does not purport to prohibit all discrimination in the transportation of freight, but in express terms directs its inhibition against unjust discrimination only. The principle of expressio unius est exclusio alterious applies here, and there is no possible escape from the conclusion that all discrimination is not embraced in the title of the Act of 1872. Having shown that the title of the act in question does not prohibit all discrimination by railroads in the shipment of freight, it would seem to be useless to cite authorities to sustain the proposition that such portion of the act which attempts to do so, is in the language of the Constitution, 'void' and inoperative; but since the majority of the court entertain different views regarding the legal questions involved in this case, I feel called upon to fortify each and every proposition that I shall present herein with an abundance of authority.

In consideration of that provision of the Constitution, this court in the case of St. Louis v. Weitzel, 130 Mo. l. c. 616, used the following language: "The evident object of the provision of the organic law relative to the title of an act was to have the title, like a guide board, indicate the general contents of the bill, and contain but one general subject which might be expressed in a few or a greater number of words. If those words only constitute one general subject, if they do not mislead as to what the bill contains; if they are not designed as a cover to vicious and incongruous legislation, then the title can stand on its own merits, is an honest title and does not impinge on constitutional prohibitions."

That great constitutional lawyer, Chief Justice Cooley, in treating this same question, in his valuable work on Constitutional Limitations, at page 205 (7 Ed.), used this language: "It may
162 therefore be assumed as settled that the purpose of these provisions was: * * * Second, to prevent surprise or fraud upon the Legislature by means of provisions in bills of which the titles gave no intimation, and which might therefore be overlooked and carelessly and unintentionally adopted; and, third, to fairly apprise the people, through such publication of legislative proceedings as is usually made, of the subjects of legislation that are being considered, in order that they may have opportunity of being heard thereon, by petition or otherwise, if they shall so de-

sire." And continuing, on page 212, he says: "The courts cannot enlarge the scope of the title; they are vested with no dispensing power; the Constitution has made the title the conclusive index to the legislative intent as to what shall have operation; it is no answer to say that the title might have been made more comprehensive, if the fact the Legislature has not seen fit to make it so. Thus, 'An act concerning promissory notes, bills of exchange,' provided that all promissory notes, bills of exchange, or other instruments in writing, for the payment of money, or for the delivery of specific articles, or to convey property, or to perform any other stipulation therein mentioned, should be negotiable, and assignees of the same might sue thereon in their own names. It was held that this act was void as to all the instruments mentioned therein except promissory notes and bills of exchange; though it is obvious that it would have been easy to frame a title to the act which would have embraced them all, and which would have been unobjectionable."

This same question came before this court again in the case of State v. Persinger, 76 Mo. 346, and on page 347, this language is used: "We are of the opinion that the motion to quash was properly sustained for the reason that the said act was entitled, 'An act to change the penalty for disturbances of the peace.' This title only authorized the passage of an act changing the penalty for
163 such disturbances of the peace as were then by law declared punishable. The said Act of 1870, while it changed the punishment for such offenses, went further and undertook to amend the Act of 1868 by so changing it as to make it an offense for one person to disturb the peace of another person. While the title of the act embraced but one subject, namely, a change of the penalty for disturbing the peace, the body of the act not only included that subject, but also another, viz., amending the law so as to make that a disturbance of the peace under the Act of 1870, which was not an offense under the Act of 1868. It therefore follows that as the Act of 1870 embraced two subjects, one of which was not expressed in its title, it is violative of the 32d section, article 4, of the Constitution of 1865, and void as to so much thereof as is not expressed in the title."

The Act of 1872, now under consideration, is a verbatim copy of an act passed by the Legislature of Illinois in 1871. At the time of its enactment that state had a similar constitutional provision to ours, and is as follows: "The General Assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this State, and enforce such laws by adequate penalties, to the extent, if necessary for that purpose, of their property and franchises." [Sec. 15, art. II, Constitution of Illinois.] In obedience to that constitutional command, the Legislature of that state passed the act of which the one in question is an exact copy, and the title of that was as follows: "To prevent unjust discriminations and extortions in the rates to be charged by the different railroads in this State, for the transportation of freight on said roads." The ques

tion we now have before us came before the Supreme Court of Illinois in the case of the Chicago & Alton Railroad Co. v. People 67 Ill. 11, and in passing upon the constitutionality of that
164 act, that court used this language: "This provision expressly directing the Legislature to pass laws to prevent unjust discrimination is a recognition of the palpable fact that there may be discriminations which are not unjust, and by implication it restrains the power of the Legislature to a prohibition of those which are unjust. That was undoubtedly the object of the Legislature in passing the existing law. This is clearly shown by its title. But the act itself goes further. It forbids any discrimination whatever, under any circumstances, and whether just or unjust, in the charges for transporting the same classes of freight over equal distances, even though moving in opposite directions, and does not permit the companies to show that the discrimination is not unjust. * * * Before this act can be enforced it should be so amended as to correspond with the requirements of the Constitution by directing its prohibitions against unjust discriminations."

When we consider that the Supreme Court of Illinois has held the act of which ours is a copy to be unconstitutional, and the fact that said opinion is in harmony with the many decisions of this court, involving similar statutes and constitutional provisions, and fortified and reinforced as they are by Chief Justice Cooley's great work, it seems to me that there is no logical escape from the conclusion that the Act of 1872, in so far as it prohibited all discriminations made by a railroad in the transportation of freight, was unconstitutional and void. These views are supported by the following cases from this court: State ex rel. v. Lafayette County, 41 Mo. 39; State v. Great Western Coffee Co., 171 Mo. 634; Kansas City v. Payne, 71 Mo. 159; State ex rel. v. Baker, 129 Mo. 482; Witzmann v. Railroad, 131 Mo. 612; Shively v. Lankford, 174 Mo. 535; Dart v. Bagley, 110 Mo. 42; In re Hauck, 70 Mich. 396; Callaghan v. Judges of Superior Court, 59 Mich. 610; 26 Am. and Eng. Ency. Law (2 Ed.), pp. 579, 590.

165 II. In the previous paragraph of this opinion we have assumed that the learned counsel for respondent was correct in his contention that the Act of 1872, from which sections 1126 and 1160 of the Revised Statutes of 1899 are literally copied, was enacted for the purpose of preventing railroad companies from making discriminations in the shipment of freight over their roads. My associate, in his opinion, has adopted that same view of that act; but with all due respect for his ability, learning and judicial experience, I feel constrained to entirely disagree from the conclusions herein reached; and, if I am right in my construction of that act, it is not only unconstitutional upon the grounds stated in paragraph one hereof, but for two other equally valid reasons, which I will now proceed to state.

It should be borne in mind that the Constitution of 1865 was perfectly silent upon the questions involved in this litigation, nor was there any legislation upon those matters until the Act of 1872 was passed. All freight and passenger traffic over railroads prior

to that time was governed by the common law, which allowed common carriers to make reasonable and just discriminations in the transportation of freight and passengers. [4 Elliott on Railroads, secs. 1467, 1565 and 1676; 17 Am. and Eng. Ency. Law (2 Ed.), p. 135; 2 Hutchinson on Carriers (3 Ed.), secs. 521, 588 and 589; Railroad Commission v. Weld, 96 Tex. 394.]

Now the body of the Act of 1872 did not say a word about just or unjust discrimination in the transportation of freight; nor is there any language contained in the act which prohibits either just or unjust discrimination, but left the shipper and carrier in that regard just where the common law placed them, with the exception as to short or long hauls. Section 1 of the Act of 1872 only prohibited railroad companies from charging more for a short haul than for a long one, along all portions of their lines, and has
166 no reference directly or remotely to the question of discrimination. Section 2 defined the meaning of the words "railroad corporations," as used in the act. Section 3 was to prevent the increase of tariff rates above what they were the year previous. Section 4 prescribes the penalty for the violation of the provisions of the act; and section 5 is an emergency clause.

The first constitutional provision adopted by this State upon this question is section 12 of article 12 of the Constitution of 1875, which reads as follows: "Sec. 12. It shall not be lawful in this State for any railway company to charge for freight or passengers a greater amount, for the transportation of the same, for a less distance than the amount charged for any greater distance; and suitable laws shall be passed by the General Assembly to enforce this provision; but excursion and commutation tickets may be issued at special rates."

Clearly, this provision is fashioned after the Act of 1872, and was laying one of the two corner stones upon which the Legislature was commanded to base a system of laws, which would "correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this State." But taken by itself, this section of the Constitution is not so comprehensive in its provisions, commands and injunctives as were those of the Act of 1872. Neither that section nor that act prohibits discriminations in the transportation of freight and passengers, but were for the purpose of preventing railroads from charging more for a short haul than they charged for a long haul, which applied to everyone without discrimination, and if it was not for section 14 of the same article, I suppose it would not be seriously contended that a railroad company would not have a perfect legal right, barring the common law rule, to discriminate in favor of one person against another, in furnishing cars and in receiving and delivering
167 freight; nor from charging one person the same price for carrying freight five hundred miles that it charged another for carrying the same amount and quality a distance of fifty miles, or from charging one person the same price for a short and a long haul, and charging another a higher or lower price for carrying the same quantity and quality of freight the same distance. If there are

y such inhibitions couched in either the Act of 1872 or in said
tion 12 of the Constitution I have been unable to find them. But
order to prevent just such discriminations as above pointed out,
tion 14 of the same article of the Constitution was adopted, which
as follows:

"Sec. 14. Railways, public highways—laws against extortion, etc.
ilways heretofore constructed, or that may hereafter be constructed
this State, are hereby declared public highways, and rail-
ad companies common carriers. The General Assembly shall pass
ws to correct abuses and prevent unjust discrimination and extor-
on in the rates of freight and passenger tariffs on the different rail-
ads in this State, and shall from time to time pass laws establish-
g reasonable maximum rates of charges for the transportation of
ssengers and freight on said railroads, and enforce all such laws by
lequate penalties."

When we consider sections 12 and 14 together, which we must do
order to get at the intention of the framers of the Constitution, it
clearly seen that it was their intention to have the Legislature pass
ch laws as would not only prevent railroad companies from dis-
iminating in furnishing cars, receiving and delivering freight, but
so to prevent all unjust and unreasonable discriminations among
ippers in the short and long hauls; but neither of said sections, nor
th construed together, were intended to prevent just and reasonable
iscriminations within the limitations of those sections and laws
thereafter to be enacted in pursuance thereof. If it had been
68 the intention of the framers of the Constitution to prevent all
discrimination, reasonable and just, as well as unreasonable
nd unjust, then why did they provide in both of said sections that
he Legislature should enact suitable laws to carry into effect these
rovisions? If the intentions had been to prohibit all discrimina-
ion, then why did they not so state in so many words in the Consti-
ution, and at the same time declare such provisions to be self-enforc-
ng. By so doing all the legislation we have upon those subjects and
he complications and litigation that have grown out of the same
ould and would have been avoided. But the fact that the Constitu-
ion did not so provide, taken in connection with its command to the
egislature to enact suitable laws to carry into effect those provisions
nd to prevent unreasonable charges and unjust discrimination and
xtortion, indicate to my mind that it was never the intention to
revent just and reasonable charges and discriminations within the
onstitutional and statutory limitations then fixed, or thereafter to
e established. And it should also be borne in mind that the con-
titutional provisions under consideration were adopted, not because
he Legislature did not previously possess ample power to enact such
aws as would prevent the abuses therein denounced, but were in-
ended as a command to the Legislature to enact such laws as would
revent the abuses therein mentioned and at the same time place
imitations upon the power of the Legislature in fixing rates to be
harged and prohibiting it from fixing a rate which would be below
hat was reasonable and just, and thereby withdraw from the Leg-
slature the power to fix rates would be confiscatory under the pro-

visions of the State and Federal constitutions. [McCully v. Rai
road, 212 Mo. 1; Railroad v. Smith, 173 U. S. l. c. 687 and 688
The Constitution by commanding the Legislature to pass suitab
laws to correct the abuses and extortions therein mentione
169 and which had been practiced by many of the roads in fixi
and collecting rates, no more intended thereby to abolish
discriminations than it did to prohibit the collection of all rates a
tolls, because the very same language of the section which is
rected at the one is directed at the other, and both are found in t
same clause and sentence of said section 14; and what applies to o
must of necessity apply to the other. Had the framers of the Co
stitution intended to prohibit the collection of all tolls for carryi
freight and passengers, then that provision of the State Constituti
would have been clearly void under article 5 of 14, amendments
the Constitution of the United States, which provide- that priva
property shall not be taken for public use without just compensatio
[Railroad v. Smith, supra.] Such a provision would be confiscato
in its nature and violative of the Constitution of the United Stat
Then by parity of reasoning, if it was not the intention to aboli
all tariff rates, then it was not the intention to prohibit all discri
nations. Clearly, it was the intention of the framers of the Co
stitution to abolish only unreasonable and extortionate rates, and
unjust and unreasonable discriminations in the transportation
freight and passengers. [Chicago & Alton R. R. v. People ex rel.,
Ill. 11.]

The Constitution commanded the Legislature to enact such la
as would carry into effect those provisions, and in obedience to th
mandate, and within the limitations prescribed, it attempted to en
such legislation as would prevent the collection of extortionate ra
and from making unjust and unreasonable discriminations by fixi
maximum rates; and in order to carry into effect those rates t
Legislature also created the Board of Railroad and Warehouse Co
missioners with power to regulate, fix and publish schedu
170 of tolls to be charged for transportation of freight and pass
gers, which were to be binding upon the companies until
adjusted, or set aside by the judgment of some proper cou
and by passing many other statutes prescribing the rights, pow
and duties of such railroad companies. [R. S. 1899, secs. 1136
McGrew v. Railroad, 114 Mo. 210; Railroad v. Smith, supra;
Cully v. Railroad, 212 Mo. l. c. 17 and 18; Winsor Coal Co. v. R
road, 52 Fed. 716; Cohn v. Railroad, 181 Mo. 30.]

Now, if our interpretation of the Act of 1872 is sound, and
viewed in the light of said constitutional provisions 12 and 14, th
we are unable to see how it can be contended that said act eit
prohibits just or unjust discrimination, or that if that had been
intention of the Legislature, then it would have been invalid un
those constitutional provisions, after the adoption. In brevity
do not believe it was the intention of the Legislature, by the Ac
1872, to prohibit either just or unjust discrimination in the tra
portation of freight over railroads, for the reason that there is no
ing in the body of the act which refers even remotely to that subj

but conceding, for argument's sake, that such was the intention of the Legislature, then in my opinion, it was abrogated and annulled by the adoption of the Constitution of 1875. That being true, the act is void, first, because the title of the act refers to one subject, namely, "unjust discriminations," while the body of the act refers to an entirely different subject, to-wit, the short and long haul which is a clear departure from the title of the bill, and for that reason it is obviously unconstitutional and void, because the subject of the act is not expressed in the title thereof, as commanded by section 32 of article 4 of the Constitution of 1865, and, second, because even if valid when enacted, it was repealed and annulled by the adoption of the Constitution of 1875.

171 This is not only the plain meaning of the language employed in the Act of 1872, and in the constitutional provisions mentioned, but it is the sound and common sense interpretation that has been placed upon them by the Board of Railroad and Warehouse Commissioners, and by every other State officer who has had anything to do with the administration of the railroad laws, and by every railroad company in the State, from the time of the passage of the act and the adoption of the Constitution of 1875 down to the time of the institution of this suit, with one exception, and that exception is found in the case of McGrew v. Missouri Pacific Ry. Co., 177 Mo. 533, which will be considered in a subsequent paragraph of this opinion. I am, therefore, clearly of the opinion that the Act of 1872 was null and void, and had no force or effect at the time of the institution of this suit because of the three reasons before stated.

III. Aside from the foregoing observations regarding the interpretation and invalidity of the Act of 1872 in the light of sections 12 and 14 of the Constitution, those sections themselves demand a most careful consideration at the hands of this court.

This brings us to the consideration of whether there is a conflict, or seeming conflict, between those sections of the Constitution, and if so, what is the duty of this court in the premises?

Section 12 makes it unlawful for a railroad company to charge a greater amount "for a less distance than the amount charged for a greater distance;" and section 14 makes it the duty of the General Assembly "to pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this State."

172 It is to be regretted that the proceedings of the Constitutional Convention of 1875 have never been printed, so that the bench and bar could see the reasons given by the framers of the Constitution for the adoption of the different provisions thereof. If we had the time and opportunity to investigate the discussion of those matters, such investigation might prove most instructive; but in the absence of sufficient time and opportunity to make such an investigation, we must ascertain from the wording of those sections of the Constitution their true meaning.

On the face of the two sections there appears to be a seeming irreconcilable conflict. If section 12 is literally construed, it might be held to mean that all discriminations, as to the long and short

hauls, just as well as unjust, under all circumstances and conditions, are intended to be prohibited; in other words, to be a constitutional enactment similar to the Act of 1872. While on the other hand section 14 required the General Assembly to pass laws to correct abuses and prevent unjust discrimination.

If the framers of the Constitution had intended by section 12 to prohibit all species of discrimination, then section 14, requiring the General Assembly to pass laws to prevent unjust discrimination, was not only a work of supererogation, as before suggested, but also created a manifest incongruity in the organic law. For it could not be true that the lawmakers intended by section 12 to prohibit absolutely all discriminations, and yet by section 14 to authorize the General Assembly to pass laws that would simply prevent unjust discrimination. And the framers of that Constitution must have had in mind not only the Act of 1872, but the decision of Napton, J., in Sloan v. Railroad, 61 Mo. 31, holding that it was lawful for a carrier to make just discriminations where the circumstances and conditions were not the same. And likewise to have known that the Supreme Court of Illinois had recently decided that the Illi-
173 nois statute, from which the Act of 1872 was borrowed, was unconstitutional, because it attempted to prohibit just, as well as unjust, discrimination.

But whatever may have been the reason that actuated the members of the Constitutional Convention, the result is that there is an incongruity, and irreconcilable inconsistency, between sections 12 and 14 of article 12 of the Constitution, and there is nothing that can now be done except either to hold that the one cuts the throat of the other, and, therefore, the Constitution itself is a felo de se (O'Brien v. Transit Co., 212 Mo. l. c. 66, and cases cited), and neither obtains or else have this court to reconcile the two. The two can only be reconciled by holding that prohibitions of section 12 are explained, modified and made consonant with the common law by the provisions of section 14. In other words, that the lawmakers explained in section 14 that by section 12 they only intended to prohibit unjust discrimination, and that what is an unjust discrimination is a question for the Legislature. This is perfectly obvious, for the reason that the very same section of the Constitution provides that the Legislature shall "pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger traffic." Why the latter provision, if section 12 was absolute and self-enforcing, as has been suggested? This idea is strengthened by the fact that section 12 itself also provides that the Legislature shall pass suitable laws to enforce its provisions, thereby showing the intention of the framers of the Constitution to delegate to the Legislature the power to reconcile the apparent conflict that exists between the two sections by enacting statutes which would avoid all extortion and unjust discrimination on the part of railroads, and at the same time protect the interests of the public and the roads themselves by permitting them to make just and reasonable discrimination
174 under the sanction and approval of the State Board of Railroad and Warehouse Commissioners. This view is supported

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by the decision of the Supreme Court of Illinois in the case cited of C. & A. Railroad v. People, 67 Ill. 11, and also by the decision in the case of Interstate Commerce Commission v. L. & N. Railway, 73 Fed. 409, construing the Interstate Commerce Act of 1887, wherein it was held that the transportation of goods involves the necessity of doing justice to three parties—the carrier, the trader and the public, the latter being the most important of all, because without that consideration, the carrier and the trader might be able to create a monopoly in respect to the necessaries of life by excluding competition from shippers at a greater distance from the point of consumption.

We conclude, therefore, that when sections 12 and 14 of the Constitution are construed together, it must necessarily be held that the framers of the Constitution did not intend to create any incongruity in the organic law, or intend to prohibit all discriminations in one breath, and only to prohibit unjust discriminations in the next, but that the intelligent lawyers and judges that composed the Constitutional Convention of 1875 knew the prior state of the law, and intended only to legislate against or provide against, unjust discrimination. Unless this be true, then we must convict those able gentlemen of a most lamentable mistake, and unless this be true, then sections 12 and 14 destroy and nullify each other.

But it has been suggested that in this case the judgment below can be sustained whether the Act of 1872 was repealed by the Act of 1887, or was substituted by the Act of 1887, or not, because section 12 of article 12 of the Constitution is self-enforcing, and any appropriate common law remedy can be invoked to enforce it, and no legislative aid is necessary. This view cannot be maintained, and at the same time give any possible effect to section 14 of article 12 of the Constitution
175 and to the Act of 1887 passed pursuant thereto. It cannot be true that the framers of the Constitution intended section 12 to be self-enforcing, and at the same time intended to make it the duty of the General Assembly to pass laws preventing unjust discriminations. The Governor of the State and the General Assembly of the State have obeyed the mandates of section 14 and have passed an act (1887) which carries out that requirement of the Constitution. Now it would be a solecism to say that the framers of the Constitution had enacted a law which would be self-enforcing, and which would prohibit all discriminations of every kind, under all circumstances and conditions, and at the same time to say that those learned lawmakers had also devolved a duty on the General Assembly to enact laws that would simply prevent unjust discrimination. It is likewise a solecism to say that one is absolutely prohibited from doing an act, and at the same time to say that he may do the act under certain circumstances and conditions.

The questions here presented for consideration and determination are not foreclosed by the decision of the Supreme Court of the United States in Louisville & Nashville R. R. Co. v. Kentucky, 183 U. S. 503. These questions and these complications and contradictions between the acts of 1872 and 1887, and the provisions of section 12 and 14 of article 12 of the Constitution, were not present in that

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case. The Fourteenth Amendment to the Constitution of the United States guarantees to every person due process of law, and no case can be found decided by the Supreme Court of the United States, and certainly not the case of Louisville & Nashville R. R. Co. v. Kentucky, 183 U. S. 503, that holds that a person can be convicted of a crime for doing an act such as is prohibited by the Act of 1872 and by section 12 of article 12 of the Constitution, and at the same time not be guilty under the provisions of the Act of 1887 and
176 under section 14 of article 12 of the Constitution. It cannot be true that any court could hold that a person could be guilty and not guilty at the same time, guilty under the Act of 1872 and under section 12 aforesaid, and not guilty under the Act of 1887 and under section 14 of article 12 aforesaid. Yet this is the condition presented in this case, and there is no solution for it that will stand the test of common sense, reason, logic or precedent, or that will be sanctioned, in my judgment, by the Supreme Court of the United States, if this case is taken into that court, as it probably will be, if the decision is adverse to the appellant herein, unless this court holds that the Act of 1872 was repealed necessarily by the Act of 1887, and further holds that what seems to be an absolute prohibition against all manner of discrimination under section 12 of article 12 of the Constitution is modified and explained by the provisions of section 14 of article 12 aforesaid; in other words, that only unjust discriminations are forbidden under the Constitution and laws of this State.

IV. Having decided in paragraphs one and two of this opinion that the Act of 1872 is unconstitutional and void, and also by the latter that said sections 12 and 14 of the Constitution are not self-enforcing, we will now determine whether or not there are any valid laws in force which give efficiency to those sections.

Respondent bases his right of recovery upon sections 1126 and 1160 of Revised Statutes of 1899, and contends that they put in operation those sections of the Constitution, and that they are in full force and effect; while upon the other hand appellant retorts by saying that said sections, which are sections 1 and 4 of the Act of 1872, brought forward and copied without change in the various revisions of the statutes from the time of their passage down to and including the Revised Statutes of 1899, and are there numbered as sections 1126 and 1160, *and* are therefore unconstitutional
177 and void, and that the mere fact that they have been brought forward and copied into the various revisions did not breathe into them new life and validity.

If we correctly understand learned counsel for respondent, he does not seriously contend that the Act of 1872 when enacted was constitutional and valid, but contends that sections one and four thereof which are sections 1126 and 1160 of the Revised Statutes of 1899 were re-enacted by an Act of 1879 revising and amending chapters 63, 64, 65 and 66 of the General Statutes of 1865, and by incorporating therein the entire Act of 1872 and passing the whole as an amended and revised bill.

The opinion of Valliant, P. J., sustains this contention of

spondent by holding that "the General Assembly of 1879 passed an act entitled 'An Act to revise and amend chapters 63, 64, 65 and 66 of the General Statutes of Missouri concerning corporations,' approved May 31, 1879, in which the sections we are now considering were included. Chapter 63 of the General Statutes of 1865 was one of the chapters so revised and amended and was entitled, 'Of Railroad Companies.' This section was germane to the subject of the chapter and was an amendment to it. The section does not rest therefore on the mere act of the legislative committee carrying it forward as in the case cited. [Brancock v. Railroad, 200 Mo. l. c. 568.]"

I have two criticisms to suggest regarding that clause of the opinion of my learned associate. First, that while section 1 of the Act of 1872 was properly reenacted in 1879 and is now section 1126 Revised Statutes 1899, and upon which this suit is based, it was repealed by an Act of 1887. Second, that said sections 12 and 14 of the Constitution are not self-enforcing, and there is no statute or common law in force which prohibits reasonable and just discrimination by railroad companies in the transportation of freight and passengers over their roads under the direction and ap-
178 proval of the Board of Railroad and Warehouse Commissioners; but upon the other hand, the Act of 1887 expressly authorizes them to do so.

I will discuss these propositions in the order stated, but before doing so I wish to state in the first place that I am at a perfect loss to understand the motive which induced the plaintiff to institute and prosecute this suit, for the reason, as shown by the freight schedules, made and promulgated by the State Board of Railroad and Warehouse Commissioners (which are public records and of which we have the right to take judicial notice), the rates with which he was charged were, in every instance, so far as I have been able to ascertain, less than the legal rates, and were evidently made for the purpose, among others, of enabling him to sell his coal in competition with the coal of mines located on other roads and in other states. If the railroad rates of which he complains had not been made by defendant he would not have been able to have marketed his coal, mentioned in this suit, in competition with coal from other mines, and would therefore have lost that trade, as will be presently shown. The defendant was also benefited by said reduced rates or it would not have made them, for the reason that it was thereby enabled to secure the transportation of said coal which it otherwise would not have been able to have done on account of the competition of other mines located on other and shorter roads. Clearly, this was the case at Boonville, where coal was going there from Lowery City and Brownington over other roads; at Sweet Springs, where coal was going from Higginsville; and Joplin, where coal was going from various mines located in the State of Kansas. If the defendant company had not made the reduced rates complained of it would have meant that the mines located on other roads and in different states would have monopolized the coal business at the points to which the reduced rates were made, and

that of course would have worked injury on those com-
179 munities as well as upon the plaintiff by limiting his mine output, and upon the defendant by depriving it of the transportation of the coal, about which this suit was brought.

Clearly, the plaintiff was not damaged by those reduced rates; but, upon the contrary, by enabling him to sell at the places named, the output of his mines was greatly increased, and the cost per ton for mining was doubtless reduced, and consequently he was thereby enabled to get a higher price for his coal than he could have received had his output been curtailed to the extent of the quantity sold at said competitive points.

Since the defendant had to run its trains any way, and as it could not, as before shown, secure the transportation of this coal unless it reduced the rates to those competitive points, it was benefited by the business so long as the rates which it received were more than the expense of the transportation.

This record shows that these reduced rates enabled the plaintiff to do business at those competitive points against mines located on other roads and in other states, and if like reductions are to be made to all other, or non-competing points, the defendant could not afford to make the reductions to plaintiff and others to the competitive points, for the reason that the loss incident to the general reduction would be much greater than the gain the defendant would derive from the plaintiff at the competitive points on account of the reduced rates. By consulting the geography of the State and the freight rates established by the State Board of Railroad and Warehouse Commissioners, it will appear that the towns to which the reduced rates were made for the benefit of the plaintiff would get their coal from other mines over other roads at a less cost; and no other point or person located on the Missouri Pacific could justly claim that he or it was injured by the company giving the plaintiff the
180 reduced rates mentioned, for the reason that those competitive towns would have the same rates from other roads whether the defendant made them or not; consequently no coal mine or other industry was or could be injured by the reduced rates made by the defendant to said competitive points.

But on the other hand, by the reduction of coal rates to the points mentioned, the Myrick coal mines were benefited, and the plaintiff was thereby enabled to keep more men employed at his mines, and his output was greatly increased, and consequently his cost per ton was materially reduced and he was thereby better enabled to sell coal at a profit than he otherwise would have been. So was the consumer or industry at the competitive points benefited by reason of the competition caused by plaintiff's coal; and the defendant was also benefited by getting the transportation of all coal shipped by plaintiff to those points. All of these are State institutions, which should be encouraged and supported by all legitimate means.

By again consulting the geography of the country, it will clearly appear that the Joplin coal rates complained of were made in competition with the coal and coal rates from the Cherokee and Pittsburg District of Kansas; and if our statute which provides that no

ss charge shall be made for a longer than a shorter haul were to
revail, as contended for by counsel for plaintiff, it would mean in
any cases that the industries in other states and foreign transporta-
on companies would thrive and wax fat at the expense of Missouri
ndustries and carriers.

The close proximity of the Cherokee and Pittsburg coal district
f Kansas to Joplin and neighboring Missouri towns is such that
he Missouri coal mines could not market their products in any such
own if it were not for said reduced rates, or if the long and
hort haul clause of the statute, as understood by some of my as-
sociates, was enforced. So long as no one in Missouri is in-
81 jured, our industries should certainly be enabled to do busi-
ness even in all competitive towns and cities of this State as
gainst outsiders, which clearly they could not do if the construc-
ion placed upon our statutes by counsel for plaintiff is correct.

We know from the common knowledge that the cost of mining
oal in this State far exceeds the cost of mining it in the State of
llinois, and if Missouri coal mines are not given reduced rates to
Boonville and other competing points, Illinois coal will surely supply
heir needs. This great difference in the price of mining coal in
llinois as compared with mining it in Missouri enables the former
vith much higher railroad rates to sell its products in this State
ven against the legal freight rates made from the Missouri mines.
The Missouri mines, therefore, in order to be enabled to do any
usiness in many towns of this State competing with the Illinois
oal, it is necessary for the railroads to make them a lower rate than
he legal rate; for instance, by an examination of the state and inter-
tate rates it appears that the rate from the Illinois coal fields to
Boonville is $1.95 per ton and to Marshall $2.10 per ton. Still this
record shows that defendant has made a rate of forty cents per ton
on coal from Myrick to Boonville, presumably in order to enable
t to haul some of the coal that is consumed at the latter place. Other-
wise, the Illinois mines would supply that city's entire demand.

Of course, it goes without argument that the defendant, like
other railroad companies, is desirous of getting as high freight
rates as it possibly can. Self-interest prompts it to do so, and when
a railroad, therefore, voluntarily reduces the rates prescribed for
it by statute or by the railroad commissioners, it must mean that it
cannot otherwise procure the freight for transportation. Railroad
companies understand the commercial conditions governing the
situation and that those conditions will not admit of trans-
182 portation by them unless at reduced rates. Besides that, they
understand that the communities they serve will be deprived
of the advantages which flow from the successful operations of their
industries. By making special or such reduced rates to meet those
commercial conditions, the competition of other markets and of like
or other commodities, they are conferring substantial benefits on
those communities. If such reduced rates are not made, in all prob-
ability the business will not be forthcoming. Under such circum-
stances, it seems to me that carriers are justified in making such rates

as will enable those communities to do business in competitive markets, provided there is no loss to them in the transaction; and it can be readily understood that if such reduced rates do not affect or influence the rates on other existing traffic, they can sometimes and under certain conditions be made very low before a loss will result therefrom.

Where a railroad plant and all facilities are already ample and sufficient to enable it to transport such freight without further expenditures, then it will be seen that the expense incurred in this particular transportation would not be in proportion to that of its regularly established business. The difference in the rail carriers' rates can sometimes be very great and it cannot be justly said that some are unreasonably high, or that others are unreasonably low, for the reason that the expense which a traffic under certain conditions adds to the already existing expense may be covered by very low rates without injury to any community or locality, and yet the rates which it may be necessary to charge upon other traffic must of necessity be higher so that the entire cost may be covered and the property be safely and successfully operated.

It is a common complaint made by the ordinary uninformed man, that the reduced competitive rates on the through rates which
183 may be lower for a longer than for a shorter haul produce a loss to the railroads which they have to recoup or make back by charging higher rates for shorter hauls; that is to say, that they do the business in such cases for less than they can afford to do it for were they not able to make an unreasonably high profit from their local business. That is an erroneous idea. If the railroads did not take the competitive business at the low rates, it would mean they would not procure any of that business, and consequently they would lose just so much revenue as would be derived from its transportation had they procured it. For instance, suppose a competitive through business was offered at ten cents a hundred and that the same carrier was charging twenty cents a hundred for the short haul or intermediate points. Under such conditions it must take the through competitive business at ten cents or not take it — all, for the reason that other roads which have shorter routes would take the business for the ten cents, which would be their legal local rate. The intermediate stations do not complain of the reasonableness of their rates, because the longer competing line does not take the through freight, yet they do not see that by doing so it would enable it to carry local shipments at a lower rate. By taking the business at the ten-cent rate there may not be as much profit to the longer road as there would be if it charged and could receive the local higher rates, but by reason of the fact that there is some profit in the business at the ten-cent or competitive rate, it can be justly said that such business adds to the receipts of the company more than to its expenses, and for that reason it is justified in engaging in said through business, provided by so doing it does not injure or affect the intermediate shipper or his business upon which the higher rates are charged. By reason of there being some profit in the business, if

profit it may be called, it makes the cost of the entire business
84 of the company less per unit and it is thereby better able to
give lower rates to the intermediate points than it otherwise
ould be.

I gather from the reports of the Interstate Commerce Commission
iat approximately the following divisions may be made of the en-
re expense of maintaining and operating the railroads of the United
tates. One-third to pay interest on stocks and bonds; another third
) be expended in maintaining stations and station grounds, salaries
f the general officers, legal officers, division officers, station agents,
lerks, telegraph operators, bridge men, section men, and all that
lass which it is necessary to retain whether the competitive through
usiness is taken or not. In these, two-thirds of the expense which
ight be called a fixed expense goes on whether the railroad hauls
en million or thirty million tons of freight. The remaining third
f the expense might be termed the movement expense, which con-
sts of the wages of engineers, firemen, conductors and brakemen,
ocomotive and car repairers, fuel, oil, waste, water, the wear and
ar of rails, decay of ties, etc. As the competitive through traffic is
ffered at certain specified rates made by influences beyond the con-
ol of the carrier to change or affect, the question to be first deter-
ined is—will it pay this so-called movement expense? The other
vo-thirds of the expense of course goes on whether the through traffic
taken or not. Any sum received in excess of this movement ex-
ense is just so much more than can be applied toward meeting the
xed two-thirds expense, and the road is thereby enabled to make the
rden lighter for the local or non-competitive traffic. The actual
xpense therefore attendant upon the transportation of competitive
affic which the railroad can secure only on condition that it charges
rtain specified rates made for it by outside influences entirely be-
nd its power to control, change or affect is the actual outlay which
movement necessitates.

It is thus seen that if the railroad plant and other facilities
85 are ample to enable it to transport such traffic without further
outlays, the expense incurred will not be in proportion to that
its regularly established business, nor will the movement of com-
titive freight always incur the entire expense included in the
veral items before mentioned comprising the movement expense.
The movement expense of such traffic might be decreased mate-
lly according to the different conditions or exigencies that might
ise. For instance, if the traffic was offered at a time when empty
rs had to be returned, which at certain seasons of the year amount
thousands, the item of wages, fuel and other supplies, together
th repairs of locomotives and cars, would not properly enter into
e cost. The expense incident to these would be largely incurred
th the movement of empty cars as well as with the loaded ones.
gain, if the preponderance of tonnage was in the direction opposite
that which the competitive business was destined and such busi-
s enabled the carrier to load trains that would otherwise be hauled
ht or empty, the expense of the new competitive business would be

inappreciable. Nor would this competitive business entail a proportionate share of the large expense of maintaining the track, bridges and culverts, which constitute a large part of this third of the movement expense. The wear and tear of these are not in direct ratio to the tonnage transported. The wear and deterioration caused by the action of the weather, the repairs, renewals and washings of embankments, of the masonry, ballast and road crossings, the decay of ties, the bridges and fences would go on just the same whether this competitive business was or was not hauled, so that it would not be proper to charge such extra business with a tonnage proportionate to the expense of their maintenance.

Bearing in mind those many influences, it will be observed that many of the items comprising the movement expense already
186 incurred by the then existing business would not be changed by the addition of the new competitive traffic, and that the entire expense of its carriage would in many cases be inappreciable.

From what has been said it will be seen that the difference in the rates of railroads can sometimes be very great, and yet it cannot be justly said of them that some are unreasonably high or others unreasonably low; that the expense which a traffic under certain conditions adds to the already existing expenses of a railroad may be covered by very low rates without injury to any community or locality, and yet the rates which it may be necessary to charge upon other traffic of necessity be higher in order that the entire cost may be covered and the property be safely and successfully operated. Any profit, therefore, which may be in the transportation of competitive traffic—and from what has been said as to the expense, we think it would be conceded that the rates would have to be exceedingly low before there was no profit—relieves the local traffic from so much of the burden of meeting the fixed steady expense, and so long as the receipts from this competitive traffic are in excess of the expenses incurred for its transportation, there can be no such thing as recouping loss on low rate competitive business by charging higher rates on local traffic, no matter how large a difference there may be between the two rates.

We might cite a case in point, which might arise, wherein a carrier by the reduction of rates enables an industry on its line to carry on its business by meeting the new commercial conditions that may spring up from time to time. For instance, the piping of gas and oil from the Kansas and Oklahoma fields to Kansas City and St. Joseph threatened to displace in those cities the sale of Missouri-mined coal, especially that mined at remote points from those cities.

To relieve the situation the railroads came to the aid of the
187 coal mines and reduced the rates in some cases to nearly one-half the figures of the legal maximum rates, and thus enabled these mines to continue their business in those cities, which otherwise could not have sold a pound of coal in either of those markets. Nor could any intermediate station claim it was unjustly discriminated against by this act of the railroads; and if the railroads were obliged to make similar rates for corresponding distances on other portions of their lines, then, of course, it would mean that these re-

ed rates would have to be withdrawn, because the small profit ived from such reduced rates to those cities would be more than set by the loss they would sustain by the reduced rates at the other ces. In such case the coal mining industries of Missouri would hurt—the railroad industry in so far as the coal traffic from those nes is concerned would be killed—the Kansas City and St. Joseph lustries and other consumers would be crippled, but the Kansas l Oklahoma industries would be benefited by having a monopoly the fuel business in those cities, and would command thereby her prices from the consumer than they could otherwise get.

By consulting the Missouri Pacific time-tables and the Interstate mmerce reports, it will be seen that the defendant operates about teen hundred miles of railroad in the United States, and that ut one-half of that mileage runs at right angles to its main lines. mmercially, the city of St. Louis chiefly serves the towns embraced hin one-half of defendant's entire mileage. The same time-table l reports show that the distance from St. Louis to the principal ns on the lines via the Missouri Pacific is longer than that of any er road which runs from that city direct to them. If, therefore, defendant desires to engage in the traffic of such towns, it will bbliged to make the same or lower rates to them as are made by the shorter-distance lines; but if it must observe the long and short-haul principle of the statute at places not reached by the shorter lines, it may find that the loss from a reduction ates to the non-competitive points would be greater than the gain noped to derive from the business of the towns reached by the rter lines—in which case it could not afford to engage in the iness as against the shorter lines' rates. A case in exact point y be suggested. The distance from St. Louis to Springfield via Frisco road is two hundred and thirty-nine miles, and via the souri Pacific it is four hundred and ninety-seven miles. In order ngage in the Springfield business, the defendant would be obliged make rates not to exceed those charged by the Frisco for two ndred and thirty-nine miles; but more than this, if the long short-haul principle, as announced by counsel for plaintiff, e to be enforced, it would have to reduce the rates back two hun- d and fifty-eight miles, or until it came to a station on its line ch is two hundred and thirty-nine miles distant from St. Louis. e question would then be presented as to whether it could not er afford to give up the Springfield business wholly to the Frisco ner than reduce its rates over a two hundred and fifty-eight mile tch of country. It must be readily seen that no one would be efited by the latter course; St. Louis and Springfield would prac- lly have but one road to serve them instead of two, and the de- dant would sustain the loss of the share of the business it might erwise control to the city of Springfield. That is but one of the ny like cases which would be produced in this State if the long short-haul rule is to be observed, namely, the same situation ld be produced at Joplin, Carthage, Aurora, Lamar, Nevada, rleston, Delta and many other places too numerous to mention, e should go to other roads. On the other hand, no one is or can

be injured by the longer line being allowed to engage in the
189 business at such competitive points reached by the shorter
line. The intermediate stations are not unjustly discrimi-
nated against or injured, for the reason that the lower rate would
be effective by the shorter line to all junction stations whether the
longer line chose to charge them or not.

The courts and Interstate Commerce Commission have rendered
many decisions, which will be presently noted, on similar question
to this, and have invariably held that the discrimination must be
unjust before the railroad is prohibited from making the lower rate
for the longer haul.

Counsel for defendant in arguing this cause stated that if the
long and short haul of the statute as understood by counsel for plain-
tiff was observed, the annual loss of about $600,000 would be en-
tailed upon his client.

While that statement is no part of the record, yet we may use it
for the purpose of illustrating the question in hand, and the great
loss that would be visited upon defendant if that rule is to be en-
forced; and if capitalized at four per cent it would be equivalent to
wiping out of existence about $15,000,000 worth of defendant's
property, and that too with no corresponding benefit to any one
but a positive injury to the competitive towns, as before shown.
And that is not all, the same proportionate loss would be entailed
upon all other railroads in this State.

The necessity of charging higher rates per mile over some di-
visions of a railroad than over others is recognized by the State
Railroad and Warehouse Commissioners. In promulgating its
schedule of maximum freight rates, effective March 1st, 1904, the
commission authorized the railroads of this State to charge higher
rates per mile between St. Louis and Kansas City on all roads located
south of the Missouri Pacific's main line than on those roads situated
north thereof. Any one can readily understand that it costs
190 more to construct and operate a railroad in some districts of
the State than in others, and it is but just that they should
be compensated by charging higher rates in those districts.

The foregoing observations have been made for the purpose of
showing that there is nothing connected with the construction and
operation of a railroad which is inconsistent with the idea that just
and reasonable discrimination may be made by a railroad company
in the transportation of freight and passengers without doing in-
justice to or inflicting injury upon any shipper or community in
the State, and for the purpose of showing what great loss would be
entailed upon the railroads of the State and the public at large if
such discrimination is not permitted. It should be borne in mind
that the framers of the Constitution, as well as the Legislature which
enacted the statute in question, were perfectly familiar with the then
existing condition of things before mentioned, when the former
framed the organic law of the State, and when the latter enacted
said statute, and certainly they must have acted with that condition
of things in mind; and to charge either of those august bodies
with a design to prevent all discrimination, just as well as unjust

under the circumstances, would do it an injustice and reflect upon its honesty and intelligence.

Returning from this divergence to the two propositions previously stated. Standing alone the Act of 1872 and section 12 of article 12 of the Constitution prohibit all kinds of discrimination as to long and short hauls, just as well as unjust, and therefore change the common law in this respect.

The Act of 1887, as shown by its title, as well as its words and context, and section 14 of article 12 of the Constitution, are aimed only at unjust discriminations, and recognize that it is reasonable, proper and lawful to charge a different or greater compensation where the short haul differs in circumstances and conditions from the long haul, and also where the short haul is not in the
191 same direction, on the same line with the long haul. It is manifest, therefore, that two incompatible, inconsistent and antagonistic provisions of law are to be found in the Act of 1872 and section 12 aforesaid on the one side, and in the Act of 1887 and in section 14 of the Constitution aforesaid on the other side. Can these conflicting statutes and provisions of the Constitution be harmonized, and if not which must prevail?

As to the statutes it is an invariable rule of law that if there is a conflict, the later one must prevail, for that is the last expression of legislative will. As to the Constitution a different question arises, for both provisions were adopted at the same time, and therefore both must be construed together, and all seeming conflict must be reconciled by construction. Otherwise, in cases of irreconcilable conflict, both would have to fail.

The framers of the Constitution of 1875 must be presumed to have known of the existence of the Act of 1872. Those learned gentlemen undertook for the first time to have the organic law treat of this subject, and they expressed their will in sections 12 and 14 of article 12 of the Constitution. From 1872 and from 1875 the lawmakers were silent in respect to this matter. In 1877 the Governor of this State called the attention of the General Assembly to these questions. The regular session did not act, and thereupon the Governor called a special session of the Legislature for the express purpose of legislating as to these questions, and that special session passed the Act of 1887. It was intended to be and purported to be a complete code of regulations pertaining to these questions. It was passed under a general law entitled, "An Act to Regulate Railroad Companies." It did not amend the Act of 1872, or refer to it in any way. Great stress is laid upon section 21 of the Act of 1887, wherein it is said: "This Act is not intended to repeal any
192 law now in force, unless in direct conflict therewith, but is intended to be supplemental to such laws."

But it will be observed that such language was wholly unnecessary and of no force, for if the Act of 1872 is in conflict with the Act of 1887, the Act of 1872 would be repealed by necessary implication, and the court would so hold whether the Legislature said so or not, and it was not within the power of the Legislature to make the Act

of 1887 simply supplemental to the Act of 1872 if the Act of 187 was in conflict with the Act of 1887. Those are questions of law t be decided by the courts and not by virtue of any expression o intention of the Legislature, for it is not a question of intention, bu a question of conflict, and therefore a question of law.

So that the legislative declaration in section 21, instead of havin any controlling effect upon the decision of these questions, shows o its face that the lawmakers themselves intended the Act of 1887 t be the law of Missouri, and that the law of 1872 should be consid ered repealed wherever it conflicted with the Act of 1887. At an rate the courts must decide what effect the Act of 1887 had on th Act of 1872.

The Act of 1887 necessarily repeals the Act of 1872, because th Act of 1872 prohibits just, as well as unjust, discriminations, an by section 1160, Revised Statutes, punishes a violation of the ac with a fine of one thousand dollars. On the other hand, the Ac of 1887 simply prohibits unjust discrimination, and the charging o a larger sum for a short haul than is charged for a long haul, bu qualifies that by limiting it to cases arising "under similar circum stances and conditions" and "over the same line in the same direc tion." Section 12 of the Act of 1887 punishes a violation of tha act by a fine of five thousand dollars. In addition to all of which, fine provided under the Act of 1872 goes to the person aggrieve whereas under section 14 of the Act of 1887 the five thousan 193 dollar fine goes to the school funds of the county where sue for. Moreover, under the Act of 1872 the person aggrieve is authorized to maintain the action, whereas under the Act of 188 the action must be maintained in the name of the State of Missou at the relation of the Board of Railroad Commissioners to the use o the school funds. And the person aggrieved is only entitled und section 10 of the Act of 1887 to recover three times the amount o the actual damages sustained by him, with a reasonable attorney fee.

The result of all of which is that it is impossible to reconcile th Act of 1872 and the Act of 1887, both as to substance and as procedure. For it cannot be true that it is an offense against th laws under the Act of 1872 to discriminate in any respect under an circumstances, and at the same time be true that under the Act 1887 there may be a discrimination where the circumstances are n similar, where the conditions are different, or where the long an short haul are not in the same direction. And likewise it cannot true that a railroad company can be fined one thousand dolla under the Act of 1872 to be paid to the party aggrieved for maki any kind of a discrimination under any circumstances whatever, a at the same time not be guilty of any offense under the law of 188 because the circumstances and conditions were different and t hauls were not in the same direction. It cannot be true that th can be two laws on the same subject, one of which makes an ac crime under all circumstances and conditions, and punishes it w one fine, and the other makes only certain qualified acts crimi

and punishes them with a different fine, to go to a different purpose, and recognizes that other acts may lawfully be done.

In other words, it cannot be true that the Act of 1872, which prohibits all discriminations, just as well as unjust, under all circumstances and conditions, can be reconciled with the Act of
194 1887, which does not prohibit all discriminations, but only unjust discriminations, and then only when the circumstances and conditions were the same and when the haul was in the same direction. Or otherwise stated, it cannot be true that a person can be guilty under one act and innocent under the other. Yet such is the result unless the Act of 1872 is repealed by the Act of 1887.

It is thus seen that the Act of 1887 covers the entire field of discrimination in the transportation of freight and passengers by railroad companies, the tolls and compensation to be charged therefor, and prohibiting a greater charge for a shorter haul than for a longer one, under the same conditions; and not only prescribes the penalties to be imposed for the violation of the act but the manner of collecting all damages done to persons in consequence of such violation is prescribed also. Under this state of things this court has repeatedly and properly held that "a statute is impliedly repealed by a subsequent one revising the whole subject-matter of the first, and intending to substitute the latter for the former." [State ex rel. v. Patterson, 229 Mo. 364; State v. Hickman, 84 Mo. l. c. 79; State v. Roller, 77 Mo. l. c. 129; Smith v. State, 14 Mo. 152; State v. Summers, 142 Mo. 586, l. c. 595; Yall v. Gillham, 187 Mo. 393; Meriwether v. Love, 167 Mo. l. c. 521.]

By closer analysis of the Act of 1887, which consists of twenty six sections, it will be more clearly seen that the subject of said section 1126 was not only fully covered thereby, but all other phases of discrimination were legislated upon, and the most drastic penalties imposed. Section 4 of the Act of 1887 clearly refers to the short and long hauls mentioned in said section 1126, and under the above rule of construction it must be held that the former by implication repealed the latter. Said section 4 of the Act of 1887 (Laws 1887, Ex. Sess., p. 17), is as follows: "It shall be unlawful for any
195 such common carrier to charge or receive any greater compensation in the aggregate for the transportation of like kinds of property under similar circumstances and conditions for a shorter than a longer distance over the same line in the same direction; provided, however, that nothing contained in this section shall apply to the carriage, storage or hauling of property, either free or at reduced rates, for the United States, for the State of Missouri, or for any fair, exposition, religious, scientific, benevolent or charitable purposes." These two sections are directly in conflict with each other. Section 1126 prohibits a railroad company absolutely, and without an exception or qualification, from charging more for a shorter than a longer haul on any part of its line in any direction, while section 4 of the Act of 1887 is not so sweeping and general in its provisions, but only makes it unlawful for railroad companies to charge a greater compensation for the transportation of property of like kinds under

similar circumstances and conditions for a shorter than for a longer distance, *over the same line in the same direction.* I have italicized the provisions of the latter section which principally differentiate the two sections. Under section 1126 it would have been unlawful to charge a greater toll for the transportation of property of like kinds under *dissimilar circumstances and conditions* for a shorter than for a longer distance over the same line *in the opposite direction,* but clearly the language of section 4 would permit such greater charge, provided the conditions are *dissimilar* and the shipments are made in the *opposite* direction. It is thus seen that the Act of 1887 not only revises the entire Act of 1872 and the various sections of the various revisions, which are copies thereof, but it is also in direct conflict with and repugnant thereto.

As before stated, this court has repeatedly held that a later statute will repeal by implication a prior one, where the repugnancy
196 between them is such that they cannot stand together or be consistently reconciled. [Glasgow v. Lindell, 50 Mo. 60; Pacific R. R. Co. v. Cass County, 53 Mo. 17; State ex rel. v. Dolan, 93 Mo. 467.]

If section 1126 is still the law of this State, railroad companies cannot lawfully do the things which section 4 of the Act of 1887, which is the same as section 1134 of Revised Statutes of 1899, expressly authorizes them to do, to-wit, to charge a greater toll for shorter hauls than for longer ones, when the conditions are dissimilar and the shipments are made in opposite directions; but if the rule announced in the cases last cited is sound, then section 1126 and not 1134 is repealed by necessary implication. And this conclusion is in harmony with another line of decisions of this court which hold the last expression of the Legislature upon a given subject should prevail in case of a conflict between it and a previous statute. [State ex rel. v. Heidorn, 74 Mo. 410.]

Again, if it was not the intention of the Legislature to repeal the Act of 1872 (sec. 1126, R. S. 1899), which prohibited the charging of more for a shorter than a longer haul in any direction, why did it provide against the charging of more for a shorter than a longer haul when the shorter haul was embraced in the longer one? Section 1126 by its terms prohibited the charging of more for a shorter than a longer haul in all directions, and therefore prohibited the charging of more for a shorter than for a longer haul when a shorter haul was embraced in the longer haul. Section 1134 was superfluous if section 1126 remained in force.

The principle that when the mind of the Legislature is directed to a particular subject, its enactment must be presumed to be exhaustive of the legislative intent with respect thereto, should obtain. Any other conclusion would convict the Legislature of passing a vain and foolish act.

The second reason why I cannot concur with the opinion
197 of my learned associate is that sections 12 and 14 of article 12 of the Constitution are not self-enforcing, but expressly provide that the Legislature should enact suitable laws for the purpose of carrying into effect those provisions. To hold otherwise

would be equivalent to expunging that mandate from those sections. Under that constitutional mandate, there has been but one act passed by the Legislature to give force and effect to those constitutional provisions which is now upon the statute books, and that is the Act of 1887, one section of which is the same as section 1134 of Revised Statutes of 1899. This section, as before stated, does not prohibit railroad companies from charging more for a shorter than for a longer haul, where the conditions are dissimilar, and the shipments are made in different directions.

This same question has many times been before the Interstate Commerce Commission, our Railroad and Warehouse Commissioners, as well as before various Federal courts. The former and the latter have invariably placed the same construction upon the long and short-haul clause of the Act of Congress covering the same question, as will appear from the following citations, that the Railroad and Warehouse Commissioners of this State have uniformly placed upon the statute under consideration.

The possibility that a discrimination may be just is recognized by section 2 of the Act of Congress, in declaring what shall be deemed unjust. [Interstate Commerce Commission v. Railroad, 1892, 145 U. S. 263.]

It was not the purpose of the Act to prohibit just discrimination in the transportation of persons or property. [United States v. Railroad, 1904, 127 Fed. 785.]

The object of section 2 of the act is to prevent one shipper from getting advantage over another in the matter of rates, only where both make a substantially like offering to the carrier. [United States v. Hanley, 1896, 71 Fed. 672.]

198 When traffic is not of like kind, or when the service is not like and contemporaneous, or when the transportation is not rendered under substantially similar circumstances and conditions, difference in charges does not constitute unjust discrimination within the meaning of section 2 of the act. [Interstate Commerce Commission v. Railroad, 1890, 43 Fed. 37, 47.]

The language of the act recognizes that a uniform rate between different shippers is not always possible or proper; that the time of service, the kind of traffic, and the circumstances and conditions under which it is transported, may materially change the just obligations and duties of the carrier to its patrons. [United States v. Hanley, 1896, 71 Fed. 672.]

A carrier subject to the act is only bound to give the same terms to all persons alike under the same conditions and circumstances. Any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge. [Interstate Commerce Commission v. Railroad, 1905, 141 Fed. 1003, 1014.]

In fixing rates for differing but analogous services, the carrier has the right to exercise an honest discretion. Trifling differences of cost or character of the services rendered do not justify disparity of charges; but where the differences are substantial, either in the work to be performed, or in the utility and value to the persons

served, a fair relation of rates meets the carrier's obligation. [Carr v. Railroad, 1901, 9 I. C. C. R. 1, 11.]

Discrimination to be unlawful must be unjust. All discriminations between persons are not unlawful under section 2 of the act, but only such as are "unjust." [Interstate Commerce Commission v. Railroad, 1890, 43 Fed. 37, 47.] It is not all discriminations that fall within the inhibition of the act, but only such as are unjust or unreasonable. [Interstate Commerce Commission v. Railroad, 1892, 145 U. S. 263, 276.]

199 What constitutes unjust discrimination? In order to constitute unjust discrimination under section 2 of the act, the carrier must charge or receive directly from one person a greater or less compensation than from another, or must accomplish the same thing indirectly by means of a special rate, rebate or other device; but in either case it must be for a "like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions." [Interstate Commerce Commission v. Railroad, 1892, 145 U. S. 263, 281.]

What matters may or may not be considered in determining the question of discrimination? The provision that discrimination must not be unjust necessarily implies that strict uniformity is not to be enforced; but that all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers and consumers, should be considered by the commission in enforcing the provisions of the act. [Tex. & P. Ry. Co. v. Interstate Commerce Commission, 1896, 162 U. S. 197, 219.]

Discrimination must consist in the doing for or allowing to one party or place what is denied to another; it cannot be predicated of action which in itself is impartial. [Crews v. Railroad, 1888, 1 I. C. C. R. 401, 1 I. C. C. R. 703.]

When through rates for a longer distance are controlled by competition between carriers, the reasonableness of local rates not so affected is not to be determined by comparison with the through rates. [Charlotte Shippers Ass'n v. Railroad, 1905, 11 I. C. C. R. 108.]

Rates from St. Louis, Nashville, Chattanooga to Hampton, Fla., were higher than rates from the same initial points to Palatka, Fla., the distance to Palatka being greater than that to Hampton. The rates to Palatka were fixed to meet competition at that point.

200 No such competition existed at Hampton. Held that the reasonableness of the Hampton rates were not to be determined by comparison with the rates to Palatka. [Interstate Commrece Commission v. Railroad, 1903, 120 Fed. 934, refusing to enforce order of Commission, 8 I. C. C. R. 503.]

The proportions received by the inland carriers of through rates on import traffic from foreign ports to inland points in the United States were considerably lower than corresponding rates on domestic traffic from ports of entry to the same inland points. The through rates were controlled by competition at the foreign ports. The commission, without considering such competition, ordered the inland

carriers to cease carrying imported traffic at any other than the rates established on domestic traffic. Held, that the effort of the commission to deprive inland consumers of the advantage of through rates, thus to give an advantage to traders and manufacturers at the large seaboard cities, would seem to create a mischief which the act was intended to remedy; that among the circumstances and conditions affecting rates which the commission should have considered, as well in the case of traffic originating in foreign ports as that originating within the United States, was competition; that the acceptance of proportions of the through rates which were lower than the corresponding domestic rates was not an act of unjust discrimination. [Texas & P. Ry. Co. v. Interstate Commerce Commission, 1896, 162 U. S. 197, reversing I. C. C. v. Texas & P. Ry. Co.]

In deciding whether the proportions of through rates on import traffic, accepted by the inland carriers for haul from ports of entry to destination, were unlawful as compared with higher inland rates on domestic traffic between the same points, Held, that the commission should have considered the following facts: That the acceptance of import traffic enabled the carriers to take advantage of the
201 preponderance of empty car movement from ports of entry, thus securing traffic for which any rates might be regarded as remunerative; that the through rates were affected by competition, both of ocean and inland carriers; that the through bills of lading furnished collateral for the transaction of business and took from the shipper and consignee the care as to intermediate charges and cost of handling, thus helping to swell the volume of business; that the tendency of the through billing was to eliminate the obstacles between producer and consumer. [Texas & P. Ry. Co. v. Interstate Commerce Commission, 1896, 162 U. S. 197, 206; 16 Sup. Ct. R. 666; 40 L. Ed. 940.]

The fact that a rate in one direction is materially higher than the rate on the same class of traffic over the same line between the same points in the opposite direction does not establish prima facie the unreasonableness of the higher rate. [MacLoon v. Railroad, 1903, 9 I. C. C. R. 642.]

The fact that a rate over a road or line in one direction is materially higher than the rate on the same class of traffic over the same road or line and between the same points in the opposite direction, does not, as in case of hauls over the same line in same directions, establish prima facie the unreasonableness of the higher rate. [Duncan v. Railroad, 1893, 6 I. C. C. R. 85, 103, 4 I. C. R. 385.]

Rate of 62 cents on "wool in the grease" was in effect from Philadelphia, Pa., to Fort Wayne, Ind. Rate on the same commodity from Fort Wayne to Philadelphia was only 34 cents. The movement of wool was almost wholly toward the East. Competition to secure east-bound traffic was therefore more intense than that resulting from efforts to secure occasional shipments to the West. On complaint that west-bound rate was unreasonable as compared with east-bound rate, held, that the circumstances were so dissimilar
202 that the reasonableness of the former rate was not to be determined by comparison with the latter. [Weil v. Railroad, 1906, 11 I. C. C. R. 627.]

Where, by reason of competition, rates to a longer distance point are lower than those in effect to a shorter distance point on the same line, the shorter distance being included within the longer, the reasonableness of the rates to the shorter distance point cannot be determined on mere comparison with those in effect to the longer distance point. [East Tennessee, V. & G. Ry. Co. v. Interstate Commerce Commission, 1901, 181 U. S. 1, 21 Sup. Ct. Rep. 519, 45 L. Ed. 719.]

The mere fact that rates to a longer distance point, which are controlled by competition, are reasonable, cannot be availed of as a ground for holding that rates to shorter distance points on the same line are unreasonable. [Interstate Commerce Commission v. Railroad, 1898, 88 Fed. 186, 195; affirmed 93 Fed. 83, 35 C. C. A. 217; 181 U. S. 29, 21 Sup. Ct. R. 512, 45 L. Ed. 729, refusing to enforce order of Commissioner, Rd. Com. of Ga. v. Clyde S. S. Co., 5 I. C. C. R. 324, 4 I. C. R. 120.]

As the petition in this case does not allege nor does the evidence disclose the fact that the shipments, mentioned in the petition, were all similar, and were made in the same direction, it fails to state a cause of action against the appellant, and the evidence fails to prove one, and for those reasons I believe the judgment should be reversed.

While dissenting in this case, I am not unmindful of the fact that Division No. 2 of this court has reached the same conclusion as those expressed in the opinion of Valliant, P. J., and while I feel like shrinking from the responsibility of running counter to the opinions of such eminent and experienced jurists, yet my sense of duty impels me to state the reason for the faith that is within me. So far I have devoted much time in trying to show why the majority opinion is not sound, and will now proceed to make a few observations regarding the opinion delivered by Division No. 2 in the case of McGrew v. Mo. Pac. Ry. Co., 177 Mo. 533.

203 The first criticism I have to offer to that opinion is directed at the following paragraph on page 544: "Another and cogent reason why section 1134 should not be held to have repealed section 1126 is, that the latter was passed in obedience to the mandate of the Constitution itself, in section 12 of article 12 of that instrument."

This paragraph of the opinion contains an erroneous statement of fact regarding the enactment of section 1126, Revised Statutes 1899. The opinion states that it was "passed in obedience to the mandate of the Constitution itself." Now, the Constitution was not adopted until the year A. D. 1875, and an examination of the Session Acts of 1872, pp. 69 and 70, will show that the act of which section 1126 is an exact copy, was passed by the Legislature of 1872, which was three years prior to the adoption of the Constitution. That being true, it cannot be contended that said section was enacted in obedience to the command of the Constitution.

I, therefore, take it that if the fact upon which that portion of the opinion is based is erroneous, then the opinion in that particular must necessarily be erroneous also. And again, the Act of 1872,

om which section 1126 is a copy, was unconstitutional and void
the time of its passage, and could in no manner form a sound
sis upon which to rest that decision. Nor can we escape that
nclusion by saying that said act was re-enacted in 1879, for the
anifest reason that it was repealed by the Act of 1887.

The second criticism I wish to suggest against that opinion is this:
n page 543 the following language is used: "The first, or section
26, Revised Statutes 1899, had and has for its object the regula-
on of freight charges in any direction, the same or opposite direc-
ons, on the same road and over any portion of the same road, re-
rdless of "circumstances or conditions," and is in the language
of the Constitution itself, article 12, section 12, supra; whereas
04 section 1134, Revised Statutes 1899, by its terms is limited
to shipments over that part of the railroad 'in the same direc-
on, under similar circumstances and conditions,' and both can
adily stand together." Now, that is clearly a misconception of
e meaning of those two sections of the statutes. The word "any"
used in section 1126 means all, and when that section declares it
nlawful for a railroad company to charge a greater compensation
r transportation of freight for a shorter than for a longer distance
"any" direction on "any" part of its road, it means that it is
nlawful for the company to make such charge for such services
all directions over its road. The word "any" as used in that
ction has the same meaning so far as directions are concerned as
has in a law or ordinance which declares it unlawful for a person
walk over a public flower garden in any direction, that is, walk-
g in all directions over the garden is prohibited, and declared un-
wful. That being unquestionably true, and if section 1126 is
ill in force, as stated in that opinion, then a railroad company
nder section 1134 cannot make such charges for hauling like
eight under dissimilar conditions, and in opposite directions, as
expressly authorized by that section, and the reason therefor
ould be, as heretofore stated, that section 1126 prohibits such greater
harge for shipments in all directions; so it must logically follow
at if section 1126 is still in force, then 1134 is not. These two
ctions are irreconcilably in conflict with and repugnant to each
her. Yes, so much so, that if section 1126 is still in force, then
e human mind can neither conceive nor state a case under sec-
on 1134 which would not violate section 1126. If such a thing
n be done, I would like very much to see that case stated. Take
e very facts stated in that opinion, and if section 1126 is in force,
then defendant could not have interposed any defense what-
05 ever to it under section 1134, regardless of the directions in
which the shipments were made. In order to sustain that
se, the court there said: "This court will take judicial cognizance
at a shipment from Myrick to Kansas City was not in the same
rection that the shipment from Myrick to Boonville was, but, in
ct, was in an opposite direction." Now, if that is true, and the
ct that the shipments mentioned were in opposite directions
stened the liability upon the defendant in that case, then by parity
reasoning this court should in this case take judicial notice of the

fact that shipments in this case from Myrick to Kansas City and those to Harrisonville are in the same direction so far as the line of railroad is concerned, and for that reason discharge the defendant in this case. But no, that cannot be done either, according to the opinion of Judge Valliant herein.

The effect of the two opinions is to find for Mr. McGrew, whether the shipments are made in the same or opposite directions. In either event the company must lose, yet, according to section 1134, it is entitled to win under the conditions stated therein, but under those two opinions those conditions can never transpire. It is, therefore, clearly seen that according to these two opinions section 1134, which is the later enactment, is repealed by section 1126, which is the prior enactment. I submit that in the very nature of things this cannot be done, and it is in conflict with the universal rule of construction, that where two statutes of different dates were enacted and are in conflict with each other, the one which was first enacted will be repealed by implication by the subsequent enactment and not vice versa.

Not only this, but by reading section 12 of article 12 of the Constitution, and section 1126, it will be seen that the opinion mentioned is in error when it says that section of the statute was enacted
in pursuance *to* the very mandate of the Constitution, and
206 is in the language thereof. The language of the Constitution is as follows: "It shall not be lawful in this State for any railroad company to charge for freight or passengers a greater amount, for the transportation of the same, for a less distance than the amount charged for any greater distance." From this quotation it will be seen that said section 1126 is not only not in the language of the Constitution, but is much broader in its provisions than those of the Constitution. If said section 12 of the Constitution was as broad in its provisions as are those of section 1126, and as stated in that opinion "has for its object the regulation of freight charges in any direction, the same or opposite directions, on the same road and over any portion of the same road, regardless of 'circumstances or conditions,'" then unquestionably section 1134 would be clearly unconstitutional and void, because it permits a greater charge for a shorter haul than for a longer one, where the conditions are dissimilar and the shipments are in different directions.

I have thus attempted to show that section 1126 was not enacted in response to the mandate of the Constitution, as stated in that opinion, and that it is much broader in its terms than are the provisions of said section 12 of the Constitution, and, therefore, it did not and could not prevent the Legislature in 1887 from repealing that section and enacting in lieu thereof section 1134.

This entire trouble and litigation has grown out of the erroneous assumption that section 1126 was enacted in response to the mandate of the Constitution, and that it is in the language thereof, and in holding all other acts and statutes upon the subject to be in subordination to that section; whereas, in fact, it was enacted three years prior to the adoption of the Constitution, and was clearly

nstitutional at the time of its passage, as before shown; and notwithstanding it was re-enacted in 1879, it was clearly and unquestionably repealed by the Act of 1887, now section 1134, Revised Statutes 1899, which latter act expressly au-ized the company to do just what the petition in the case charges th doing, and is not, therefore, lawful.

Counsel for respondent finally contends that appellant can-raise any constitutional questions in this court, because they not presented to the court below. As a general proposition is true, but where the sole cause of action arises out of the tion of a statute which is unconstitutional, and there can be no very except by giving that statute force and effect, then its itutionality can be raised at any stage of the proceedings, and ny court where the cause is pending, at any time.

he reason for that rule is that if the statute is unconstitutional void, and that is the only law upon which the case can be icated, then there is no law creating a cause of action, and equently there can be no recovery. [State ex rel. v. Smith, 177 69, l. c. 92; State ex rel. v. Smith, 152 Mo. 444; Ex parte old, 100 U. S. 371; State ex rel. v. Smith, 141 Mo. 1; Kaukauna v. Green Bay Co., 142 U. S. 254; Kirkwood v. Meramec High-s Co., 160 Mo. l. c. 118.]

am, therefore, of the opinion that the judgment should be sed and judgment entered here for appellant. Fox, C. J., Burgess, J., concur.

A. M. WOODSON, *Judge*.

In the Supreme Court of Missouri, in Banc, April Term, 1915.

nd thereafter, to-wit, on the 19th day of July, 1915, the follow-further proceedings were had and entered of record in said e.

17317.

McGrew Coal Company, Respondent (D. E.),
vs.
Missouri Pacific Railway Company, Appellant (P. E.)

ow at this day there is presented by the Missouri Pacific Rail-Company, appellant, to the Honorable James T. Blair, Acting f Justice of the Supreme Court of Missouri, in Chambers, tition for the allowance of a writ of error from the Supreme t of the United States to the Supreme Court of Missouri, a of error from the Supreme Court of the United States to the eme Court of Missouri, an assignment of errors, a citation to aid respondent, and a bond in the sum of $2,000; which said of error is allowed, said citation signed, said assignment of s filed, and said bond approved and ordered filed.

208a In the Supreme Court of Missouri, April Term, 191
In Banc.

And thereafter, to-wit, on the 19th day of July, 1915, the follow
ing further proceedings were had and entered of record in said caus

"McGrew Coal Company, Respondent (D. E.),
vs.
Missouri Pacific Railway Company, Appellant (P. E.).

Comes now the said Appellant by attorney, and files præcipe co
taining instructions as to transcript of the record in this cause to
filed in the Supreme Court of the United States."

209 Which said petition for Writ of Error is in words a
figures as follows to-wit:

In the Supreme Court of the State of Missouri, April Term, 191

No. 17317.

McGrew Coal Company, Respondent,
vs.
The Missouri Pacific Railway Company, Appellant.

The petition of The Missouri Pacific Railway Company, the ab
named appellant, (hereinafter called the petitioner) hereby s
forth that on the 29th day of June, 1915, the Supreme Court of
State of Missouri made and entered a final order and judgm
herein, in favor of the above named respondent, and against t
petitioner, in which final order and judgment and the proceedi
had prior thereunto in this cause, certain errors were committed
the prejudice of this petitioner, all of which will more in de
appear from the assignment of errors hereto attached and mad
part hereof; that the Supreme Court of the State of Missouri is
highest court of the State of Missouri in which a decision in this m
ter could be had.

Wherefore, this petitioner prays that a writ of error from
Supreme Court of the United States may issue in this behalf
the Supreme Court of the State of Missouri, for the correction of
errors so complained of, and that a transcript of record, proceedi
and papers in this cause, duly authenticated, may be sent to the
preme Court of the United States.

Dated this 19th day of July, 1915.

EDWARD J. WHITE,
H. C. CLARK,
JAS. F. GREEN,
Attorneys for Petitioner (Plaintiff in Error)

210 Which said assignment of errors is in words and figures as follows, to-wit:

In the Supreme Court of the State of Missouri, April Term, 1915.

No. 17317.

McGrew Coal Company, Respondent,
vs.
The Missouri Pacific Railway Company, Appellant.

Assignment of Errors.

Now comes The Missouri Pacific Railway Company, appellant, as a petitioner for a writ of error as set out in its petition, which is hereto attached, and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Mossouri in the above-entitled cause there is manifest error, in this, to-wit:

I. That the Supreme Court of the State of Missouri erred in holding that Sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Missouri, 1909, are not in violation of Section 1 of Article Fourteen of the Amendments to the Constitution of the United States in this, to-wit: That said sections of the Revised Statutes of Missouri deprive this appellant of its property without due process of law and deny to it the equal protection of the law.

II. That the Supreme Court of the State of Missouri, in its judgment and decision entered in this cause, erred in holding that Section 12 of Article Twelve of the Constitution of Missouri adopted in the year 1875 was not, and is not in violation of Section 1 of Article Fourteen of the Amendments to the Constitution of the United States, in that said provision of the Constitution of the Sate of Missouri did not, and does not deprive appellant railway company of its property without due process of law, nor deny to appellant the equal protection of the laws.

211 III. Appellant avers that the decision of the Supreme Court of the State of Missouri and the judgment of said Court in this cause, in reaffirming and following the former decisions of the Supreme Court of Missouri in cases of McGrew v. Railway Company reported in 258 Mo. 23, and McGrew v. Railway Company reported in 230 Mo. 496, deprives this appellant of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

IV. This appellant avers that Sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Missouri, 1909, and Section 12 of Article Twelve of the Constitution of the State of Missouri, 1875, are in conflict with Section 8 of Article One of the Constitution of the United States and various laws passed by Congress, in this, to-wit: That appellant railway company is an interstate railroad and its lines extend over and through the states of Missouri,

Kansas, Colorado, Nebraska, Illinois, Oklahoma, Arkansas and Louisiana, and that it is engaged in interstate commerce over its said lines through all of said states, and operates trains over its said lines in transporting freight and passengers through said states; that said sections of the Revised Statutes of the State of Missouri and said Section of the Constitution of Missouri above referred to seek to compel appellant railway company arbitrarily to fix rates for the transportation of freight in Missouri and in comparison with rates existing in all of said states, without regard to the laws passed by the Congress of the United States regulating interstate commerce; and the decision of the Supreme Court of Missouri, in holding valid the provisions of the Constitution of Missouri and the sections of the statutes of Missouri above referred to, denies to appellant the equal protection and benefit of the law, and deprives appellant of its property without due process of law in violation of Section 1 of Article Fourteen of the Amendments to the Constitution of the United States.

212 V. Appellant avers that Sections 3173 and 3211 of the Revised Statutes of the State of Missouri prohibit discrimination in all cases, without regard to whether such discrimination is unjust or just and reasonable, and the decision of the Supreme Court of the State of Missouri in this cause, in holding said sections of the statutes constitutional and valid, deprives appellant of its property without due process of law and denies to it the equal protection of the law, in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

VI. Appellant further says that the Supreme Court of Missouri erred in overruling appellant's motion for rehearing in this cause, in which motion it was averred that the decision of said Court denied to appellant the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

VII. That the Supreme Court of Missouri likewise erred in its decision construing Sections 3173 and 3211 of the Revised Statutes of Missouri in that said decision is opposed to divers decisions of the Supreme Court of the United States construing and interpreting similar statutes; the said decision of the Supreme Court of Missouri declaring that any discrimination in charges for the transportation of freight is unlawful, without regard to the question of competition or the circumstances and conditions attending the transportation of commodities.

EDWARD J. WHITE,
HARVEY C. CLARK, AND
JAMES F. GREEN,
Attorneys for Appellant.

212½ [Endorsed:] In the Supreme Court of Missouri. In banc. Case No. 17317. Room No. — McGrew Coal Company, Respondent, vs. The Missouri Pacific Railway Company, Appellant. Petition for Writ of Error and Assignment of Errors. Edw. J. White, H. C. Clark and J. F. Green, for Appellant. Filed Jul- 19, 1915. J. D. Allen, Clerk.

213 A copy of which said bond is in words and figures as follows, to-wit:

In the Supreme Court of the State of Missouri, April Term, 1915.

No. 17317.

McGrew Coal Company, Respondent,
vs.
The Missouri Pacific Railway Company, Appellant.

Know all men by these presents, That we, The Missouri Pacific Railway Company as principal, and J. R. Davis and Chas. E. Gilbert, as Sureties, are held and firmly bound unto McGrew Coal Company in the sum of Two Thousand Dollars to be paid to McGrew Coal Company, for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Signed with our seals and dated this 19th day of July 1915.

The condition of the above obligation is such that:

Whereas, at the April Term, 1915, of the Supreme Court of the State of Missouri, in a suit pending in said Court, wherein McGrew Coal Company was Respondent, and The Missouri Pacific Railway Company was Appellant, judgment was rendered against the said Appellant, and said appellant, The Missouri Pacific Railway

214 Company, having obtained a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Missouri, to reverse the judgment in the aforesaid suit, and a citation directed to said Respondent, citing and admonishing it to be and appear at a Supreme Court of the United States, to be held at Washington, D. C., not exceeding thirty days from and after the date of the citation in said cause.

Now, therefore, if the said appellant shall prosecute said writ to effect and answer all damages and costs, if it fails to make good its plea, then the above obligation is to be void; otherwise to remain in full force and effect.

[SEAL.] THE MISSOURI PACIFIC RAILWAY COMPANY,
By J. G. DREW, *Vice-President.*
J. R. DAVIS.
CHAS. E. GILBERT.

Attest:
F. W. IRLAND,
Assistant Secretary.

Approved by—
JAMES T. BLAIR,
Acting Chief Justice of the Supreme Court of Missouri.

215 STATE OF MISSOURI, *sct:*

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, hereby certify that the above and foregoing transcript contains a full, true and correct copy of all records, papers and proceedings in the case of McGrew Coal Company, Respondent versus The Missouri Pacific Railway Company, Appellant, as called for in said præcipe filed herein, as fully as same appears of record and on file in my office.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court at office in the City of Jefferson this 4th day of August 1915.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,
Clerk Supreme Court of Missouri.

Endorsed on cover: File No. 24,884. Missouri Supreme Court. Term No. 601. The Missouri Pacific Railway Company, plaintiff in error, vs. McGrew Coal Company. Filed August 20th, 1915. File No. 24,884.

Office Supreme Court, U. S.
FILED
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JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
McGREW COAL COMPANY,
Defendant in Error.
No. 222.

REPLY BRIEF OF PLAINTIFF IN ERROR.

JAMES F. GREEN,
Attorney for Plaintiff in Error.

EDWARD J. WHITE,
Of Counsel.

St. Louis Law Printing Co., Printers' Bldg., Ninth and Walnut. Bell, Main 1819.

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Plaintiff in Error,
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Defendant in Error.
No. 222.

REPLY BRIEF OF PLAINTIFF IN ERROR.

Plaintiff (defendant in error in this court) devotes a considerable part of its brief to the contention that it is the peculiar province and privilege of the state courts to construe their own statutes, even though the correctness of their decisions might not be approved by this tribunal. But we confidently assert that the construction of a state statute by the highest court of the state is not controlling on

this Court, where the statute itself or the interpretation placed upon it results in depriving a citizen of his property in violation of the Fourteenth Amendment to the Federal Constitution.

The statute sought to be enforced in this case is a **penal** statute, and defendant carrier, throughout the proceeding, has contended that the enforcement of the provisions of this statute denies to it the equal protection of the laws and deprives it of its property without due process of law. In a recent case:

White v. Delano, 191 S. W. Rep., l. c. 1016,

the Supreme Court of Missouri said:

> "To deter a person from asserting his constitutional rights in a court of justice by **prescribing excessive penalties,** physical force or mental restraint is, for all practical purposes, a denial to him of due process of law. He can only have the benefit of the due process clause of the Constitution by going into court, being given a hearing and having judgment pronounced according to the law of the sovereignty, and if for any good reason he is denied that right, then he has not had his day in court within the meaning of the State and Federal Constitutions. In other words, the courts of this country will no more permit a partial closing of the doors of the courts of justice to litigants than they will tolerate a complete closing—the fundamental law of the land established the court,

and by providing that they should be open to all, means that they have no doors to close in the face of a *bona fide* litigant; consequently, any statute which denies or trammels the right of a person to freely present his lawful rights to a court of justice for determination must yield to the superior mandate of the Constitution."

Preliminary to a further discussion of the questions involved, it is well to have a clear understanding of the issues raised by the pleadings in the case. The first count of the petition, which is similar to the others, alleged:

"That for the carriage of said coal defendant fixed, charged and demanded and **received** of the plaintiff 80 cents per ton, an illegal freight rate, being 30 cents per ton more than defendant was by law entitled to fix, demand, charge and receive, in this: That during all said times and dates herein named, defendant had fixed, charged, demanded and received for the carriage for the same class of coal over its said line, **and over another part of the said road**, from its station of Liberal, Missouri, and to another of its stations, to-wit, Granby, in said State, a distance of 77.14 miles, 50 cents per ton, by the carload, while the distance from said Myrick to Strasburg was only 61.95 miles, etc." (Rec., p. 13).

And said petition further averred that plaintiff

was **"damaged and aggrieved"** by reason of said illegal freight charges.

These averments of the petition, to-wit, that plaintiff paid the freight charges and that it was damaged and aggrieved, were challenged and controverted by the general denial which was pleaded in the answer of the railway company, and these averments of the petition were not admitted in the stipulation of facts on which the cause was submitted, nor was any proof offered in support of the same.

It devolved upon the plaintiff, therefore, to **prove some damage** sustained as a condition precedent to a recovery of any portion of the penalty authorized by section 3211. That section, by its terms, declared that the penalty provided therein could be recovered **"by civil action by the party aggrieved"**. The answer of the railway company further averred that plaintiff was prosecuting its suit under the provisions of Sections 3173 and 3211, Revised Statutes of Missouri, 1909. No issue was raised by replication or other plea to this portion of the answer other than by motion to strike out all of the answer except the general denial, and in its motion to strike out plaintiff assigned only the following reasons:

> "First. Said parts of said answer and the alleged defenses therein set forth are based upon an erroneous construction of said provisions of

the State and Federal Constitutions and upon an erroneous construction of the statutory provisions referred to in said answer.

"Second. Said parts of said answer and the defenses as pleaded allege erroneous conclusions drawn from said constitutional and statutory provisions referred to therein.

"Third. They state no facts constituting any defense to the causes of action contained in the petition.

"Fourth. They are improperly pleaded in the answer, and can only be urged by demurrer to the petition" (Rec., p. 23).

It stands admitted, therefore, that plaintiff's cause of action is based on section 3173, and that its right of recovery is predicated on section 3211. This latter section gives no right of action for a specific sum as damages, but provides that the **party aggrieved** may have such remedy as is provided by the act, to-wit, that "any railroad corporation which shall fix, demand, take or receive from any person or persons any greater toll or compensation for the transportation, receipt, handling or delivery of goods or merchandise, in violation of the provisions of this article, shall forfeit and pay for any such offense any sum **not exceeding one thousand dollars** and costs of suit, including a reasonable attorney's fee to be taxed by any court where the same is heard by appeal or otherwise," etc., and it is significant

that, although there was not a scintilla of evidence showing that the Coal Company paid any sum as freight on the various consignments pleaded in the petition, it was allowed to recover the several sums set out in the record, among which the following are noted (Rec., p. 24):

	Amount of judgment.	Excess over maximum penalty.
42nd Count.....	$1,044.99	$ 44.99
45th Count.....	2,032.99	1,032.99
46th Count.....	4,317.00	3,317.00
47th Count.....	4,703.98	3,703.98
Total excess.....		$8,098.96

So that even if any judgment was authorized under the section, this one is erroneous on its face to the amount of $8,098.96.

The case of

Union Pacific Ry. Co. v. Goodridge, 149 U. S. 680,

is cited by defendant in error in its brief (page 16), but there is a striking difference between the facts shown in that case and those of the case at bar. The Colorado statute under consideration in the Goodridge case prohibited a carrier from charging "a greater sum than it shall, while operating under the classification and schedule then in force, demand or re-

ceive from any other person, company or corporation **for a like service from the same place or upon like conditions and under similar circumstances''.** And the penalty allowed the party aggrieved had some reference to the actual pecuniary loss sustained, to-wit, **three times the actual damages sustained or overcharges paid by the party aggrieved.** In that case it was shown that the Marshall Company had been receiving a rebate upon all coal transported by it to Denver, which rebate was not allowed to its competitors in business, and the damages sustained were measured by the amount of such rebate.

In the present case the statute prohibits the charging of a greater sum for the transportation of goods for any distance than is charged for the transportation of similar quantities over a greater distance upon the same road, without regard to whether the transportation is under the same or similar circumstances.

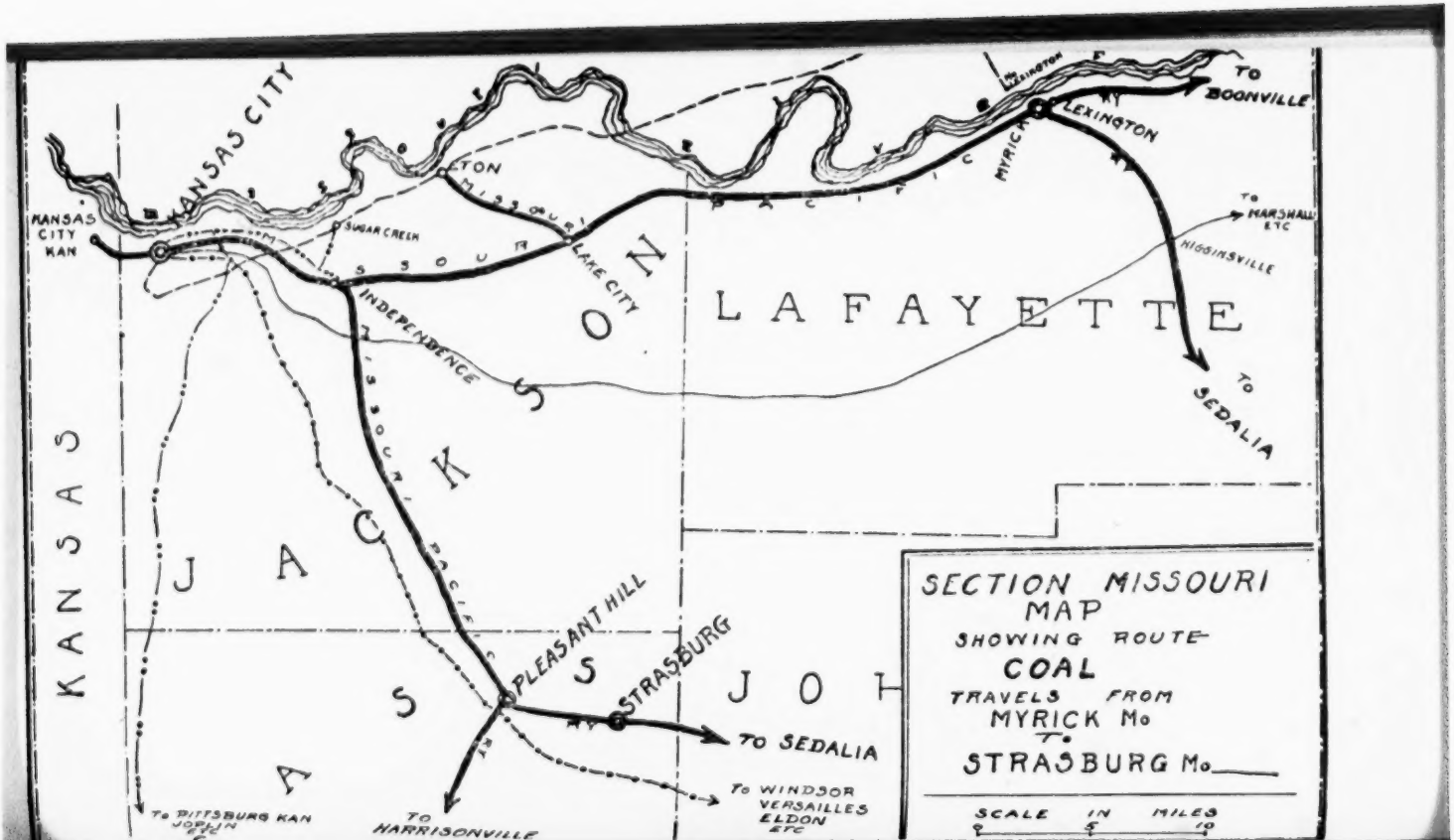
The McGrew Company was charged under the Missouri statute precisely the same amount for transporting its coal from Myrick to Strasburg that was charged any other coal dealer for transporting said commodity from Myrick to Strasburg, and in like manner, it would have been charged the same amount for transporting coal from Liberal to Granby as

was charged any other coal dealer for transporting coal from Liberal to Granby. There being no averment of any competition between the points used as comparisons in the petition and no averment of any actual loss sustained by the McGrew Coal Company because of the charge, if any, exacted from it by the railway company, the rule announced in the case cited by counsel for defendant in error is not applicable to the facts in the present case.

In the Goodridge case there was competition; the parties selling in the same market. Here the general denial in the answer of the railway company raised an issue as to the payment of any freight by the coal company, and there was no proof of any such payment, and therefore no proof of any damage sustained; nor was there any proof as to any competition between the dealers selling at the stations named for comparisons in the petition in the cause.

Myrick is located in Lafayette County, and to reach Strasburg, which is in Cass County, plaintiff's coal was transported in a westwardly direction to Independence on defendant's line, and from there in a southerly direction to Strasburg. Liberal is in Barton County, and the transportation from that point would be in a southwesterly direction to Pittsburg, in the State of Kansas, and from there to

Asbury, in Missouri, and then by defendant's line, probably to Carthage and Webb City, and from thence in a southerly direction to Granby. The various stations involved in the first count of the petition are indicated on maps or diagrams showing the southwestern part of Missouri, which maps are embodied in this brief. (See following page.)


KANSAS CITY
KANSAS CITY KAN
SUGAR CREEK
INDEPENDENCE
LAKE CITY
MISSOURI
PACIFIC
MYRICK
LEXINGTON
TO BOONVILLE
TO MARSHALL ETC
HIGGINSVILLE
TO SEDALIA
LAFAYETTE
JACKSON
KANSAS
PLEASANT HILL
STRASBURG
TO SEDALIA
TO WINDSOR VERSAILLES ELDON ETC
TO PITTSBURG KAN JOPLIN ETC
TO HARRISONVILLE
SECTION MISSOURI
MAP
SHOWING ROUTE
COAL
TRAVELS FROM
MYRICK Mo
To
STRASBURG Mo
SCALE IN MILES
0
5
10

SECTION MISSOURI
MAP
SHOWING ROUTE
COAL
TRAVELS FROM
LIBERAL Mo
TO
GRANBY Mo
SCALE IN MILES
0 5 10
TO KANSAS CITY
NEVADA
NASSAU JCT
VERNON
TO FT SCOTT
ARCADIA
LIBERAL
LAMAR
CORNELL
PITTSBURG
ASBURY
CARTHAGE JCT
CARTHAGE
CORONA
WEBB CITY
JOPLIN
GRAND FALLS
GRANBY
NEOSHO
MEARS MINES
To SOUTH GREENFIEL
To ARKANSAS
MISSOURI PACIFIC RAILWAY
ST LOUIS - SAN FRANCISCO RAILWAY
KANSAS CITY SOUTHERN RAILWAY

Nor are the portions of plaintiff's petition, which are challenged by the general denial in the answer of the railway company, aided by the stipulation as to certain facts which is found in the record. It appears that in connection with the motion to strike out parts of the answer plaintiff's counsel offered the stipulation of facts, and it was objected to on the ground that it had no place in the consideration of the legal questions which were before the trial court in considering the motion. The stipulation was, however, admitted in evidence (Rec., p. 34). Thereafter, on the further hearing of the case, the stipulation was again offered; counsel for the railway company objected to it on the ground that the petition did not state facts sufficient to constitute a cause of action; this objection was overruled, and the stipulation again offered (Rec., p. 35), as follows:

> "It is hereby stipulated between the parties that the defendant's stations, the rates charged by the defendant, including those paid by the plaintiff, the amount of coal transported, and the distances set up in the several counts of the petition are correctly stated therein.
>
> "It is further stipulated that such coal was delivered by the plaintiff to the defendant for shipment in the usual and ordinary way, without any direction or request by plaintiff as to what particular trains the same was to be trans-

ported in, and that the defendant received and transported the same in the usual and ordinary course of the business, on the usual trains passing over its road.

"It is further agreed that the trains in which the defendant hauled said cars of coal contained other cars and shipments consigned from points within this State to points without the same, from points without the same to points within this State, and from points without this State, through this State, and to points in other states."

This was all of the evidence offered on the part of plaintiff. Defendant railway company offered no evidence, but requested the Court to declare that, under the pleadings and the admissions, plaintiff was not entitled to recover. So that plaintiff contented itself with the assumption in the stipulation that freight charges were paid by it and offered no proof as to the actual amounts paid, and no proof as to the pecuniary loss or damage, if any, sustained by it in consequence of the different rates charged by the railway company over other portions of its road on which plaintiff was not transporting its coal.

If the Coal Company paid the freight on the coal transported, the amount thereof was added to the selling price to the purchaser, and, if the Coal Company did not pay the freight, but the freight charges were paid by the purchaser, then the latter is the

party aggrieved, if any one, and not the McGrew Coal Company. So that, in either event, plaintiff has sustained no loss or damage in consequence of the transportation.

II.

Defendant in error, however, in its brief (paragraphs V and VI) contends that the facts in the case at bar are similar to those involved in the case of

Louisville & Nashville R. R. v. Kentucky, 183 U. S. 504,

and that the railway company, being a Missouri corporation, is estopped from complaining that the statute upon which this suit is based is in violation of the Constitution of the United States.

An examination of the Kentucky case will disclose that the statutes involved in the two cases are not similar. The title of the Kentucky act was:

> "An Act to prevent railroad companies or corporations owning and operating a line or lines of railroad and its officers, agents and employes from charging, collecting or receiving extortionate freight or passenger rates in this commonwealth."

And the statute itself prohibited the charging of any greater compensation for the transportation of

passengers or property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance **over the same line in the same direction.** A violation of this statute would naturally be a discrimination, because the hauls would be under the same or similar circumstances and over the same line in the same direction, while the Missouri act prohibits the exaction of a greater charge for a shorter than for a longer haul **in any direction and over different portions** of the same road. It is stated in the opinion in the Kentucky case that it was practically admitted that the defendant company had, at the time and place alleged, charged and received for the carriage and transportation of coal over its line of road a greater compensation for a shorter than for a longer distance over the same line in the same direction—**the shorter being included within the longer distance—without having been authorized by the Railroad Commission so to charge, and after the Commission, upon investigation, had refused so to do.**

Further in the opinion this Court said:

> "When the citizens of Kentucky voluntarily seek and obtain a grant from the State of a charter to build and maintain a public highway in the form of a railroad, it would seem to be evident that it takes, holds and operates its road subject to the constitutional inhibition we

are considering, and are without power to challenge its validity. It may be that in a given case a railroad company may be able to show **that the State has disabled itself from enforcing the provision by a contract previously made,** and it may be that cases may arise in which the provision can not be enforced, because operating as an unlawful interference with commerce between the states. Indeed, those very positions are taken by the plaintiff in error in this case, and will receive our attention hereafter. But apart from such contentions, and looking only at the case of a company voluntarily formed to carry on business **wholly within a state,** we are unable to see how such company can successfully contend that it can be exempted by the courts from the operation of the Constitution of the State."

In this connection we direct the attention of the Court to the fact that the Pacific Railroad Company of Missouri, to whose charter rights plaintiff in error has succeeded, was incorporated by an act of the Legislature of the State in the year 1849 (Acts of 1849, p. 219). Section 11 of said act authorized the company to build its road along or across any street or county road, or the streets or wharves of any town or city and over any stream or highway, etc., and section 12 of the act provided that the company "shall determine the terms, con-

ditions and manner in which merchandise, property and passengers shall be transported thereon. * * *

> **Said company may receive such tolls and freights as may be determined on by the directors and shall keep posted up statements of the rates of toll and freight to be charged.''**

In the year 1877, in the case of

A. & P. Railway Co. v. City of St. Louis, 66 Mo. 228,

the Supreme Court of Missouri had occasion to consider the charter of the corporation. An action was brought by the railway company against the city, its mayor, city engineer and other officers, to restrain them from tearing up or otherwise interfering with a railroad track which had been laid down by the company in Poplar street and on the levee of the city. Plaintiff claimed that it derived the right to lay and maintain the track from the charter of the Pacific Railroad Company through a lease, which plaintiff company had taken of the road, property and franchises of that company. In the course of the opinion the Court said (*l. c.* 259):

> "But respondent insists that the twenty-seventh section of Article IV of the Constitution of 1865 repealed the act in question. That section reads as follows: 'The General Assembly shall

not pass special laws granting to any individual or company the right to lay down railroad tracks in the streets of any city or town'. There is no conflict between this section and the act of the Legislature. This section of the Constitution **is prospective in its operation.** Numerous decisions, and notably that in the case of State *ex rel.* v. Macon County, 41 Mo. 457, have settled that question. The Act of the General Assembly upon which the company relies was passed before the adoption of the Constitution, and the seventeenth section of the Constitution was restrictive of the power of **subsequent Legislatures, and had no retrospective effect to repeal past legislation.**"

Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, which were first enacted in 1872, could not in anywise impair the obligation of the contract which had in 1849 been entered into between the State and the railway company, and Section 9 of Article XI of the Constitution of Missouri, adopted in the year 1875, only authorized the passage of legislation "to correct abuses and prevent **unjust discrimination and extortion** in the rates of freight and passenger tariffs on the different railroads in this State". The question, therefore, whether the railway company was guilty of an unlawful discrimination in the exaction of charges of freight, if any, from the coal company on the various hauls alleged in its petition was one upon

which it **was entitled to a hearing**, and the rendition of a judgment aggregating more than sixteen thousand dollars based upon the **mere verbiage of a statute** was the taking of the carrier's property without due process of law.

III.

We reiterate the proposition asserted in the original brief, that the enforcement of the provisions of Section 3173, Revised Statutes of Missouri, imposes an unreasonable burden upon interstate commerce.

The case of

Wabash Railway Co. v. Illinois,
118 U. S. 557,

came to this Court on a writ of error to review a decision of the Supreme Court of Illinois. The statute involved was the long and short haul provision of that State. In the course of the opinion, this Court said:

> "If the Illinois statute could be construed to apply **exclusively** to contracts for a carriage which begins and ends within the State, **disconnected from a continuous transportation through or into other states**, there does not seem to be any difficulty in holding it to be valid. For instance, a contract might be made to carry goods for a certain price from Cairo to Chicago or from Chicago to Alton. The charges for these

might be within the competency of the Illinois Legislature to regulate. The reason for this is that **both the charge and the actual transportation in such cases are exclusively confined to the limits of the territory of the State,** and is not commerce among the states, or interstate commerce, but is exclusively commerce within the State."

One of the paragraphs of the railway company's answer which was stricken out in the trial court was as follows:

"For further answer to said count the defendant says that Sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Missouri, 1909, and Section 12 of Article XII of the Constitution of Missouri, 1875, are in conflict with Section 8 of Article I of the Constitution of the United States and the various laws passed by Congress thereunder, in this: that the defendant's railroad is an interstate road and its lines extend over and through the states of Missouri, Kansas, Colorado, Nebraska, Illinois, Oklahoma, Arkansas and Louisiana, and that it is engaged in interstate commerce over its said lines through all of said states, and operates trains over the same in transporting freight and passengers through said states; that said section of the Constitution of Missouri and sections of the revised statutes seek to compel defendant arbitrarily to fix its rates in this State and in all of said states and in comparison with

rates existing in all of such states, **without regard to the laws passed by Congress regulating interstate commerce**" (Rec., p. 20).

In the stipulation which was filed in the case now before the Court, it is stated that:

> "It is further agreed that the trains in which the defendant hauled said cars of coal contained other cars and shipments consigned from points within this State to points without the State, from points without the same to points within this State, and from points without this State, through this State, and to points in other states."

The same hauls, therefore, in which plaintiff's coal was transported involved interstate hauls, and on such interstate hauls, from Myrick, Missouri, for example, to a point in the State of Kansas, the interstate shipper was charged and paid the same rate on the portion of the haul from Myrick to Independence, Missouri, that the McGrew Coal Company paid on its haul from Myrick to Independence **en route** to its final destination at Strasburg, Missouri. The comparison of rates in the first count of plaintiff's petition is a comparison, as heretofore stated, between the haul from Myrick to Strasburg, in the State of Missouri, **and the interstate haul from Liberal, Missouri, through a portion of the State of Kansas**, to Granby, Missouri.

Section 3173 of the Revised Statutes of Missouri, regulating the charges for these hauls, does not purport to be confined **to transportation wholly within the State of Missouri,** but its prohibitions are directed against any railroad corporation which in the State "shall, directly or indirectly, charge or collect for the transportation of goods, merchandise or property on its road **for any distance** any larger or greater amount as toll or compensation than is charged or collected for the transportation of similar quantities of the same class of goods, merchandise or property over a greater distance **upon the same road,** etc."

This Court said in the case of

Wilmington Transportation Company v. Railroad Commission, 236 U. S., l. c. 155,

"It was by the application of these principles that it was decided that a state could not prescribe rates for interstate railroad transportation, even with respect to that portion of the route which was within its own territory. As was said by Mr. Justice Miller in delivering the opinion of the Court upon this question (Wabash Railway v. Illinois, 118 U. S. 557-577), after recognizing the authority of the State to prescribe intrastate rates, 'But when it is attempted to apply to transportation through an entire series of states a principle of this kind, and each one of the states shall attempt to establish its own rates of transportation, **its own methods to pre-**

vent discrimination in rates or to permit it, the deleterious influence upon the freedom of commerce among the states and upon the transit of goods through those states can not be over-estimated. That this species of regulation is one, which must be, if established at all, of a general and national character, and can not be safely and wisely remitted to local rules and local regulations, we think is clear from what has already been said.' And the same conclusion has been reached with respect to the fixing of rates for railroad transportation which, **while beginning and ending in the same state, passes through the territory of another state.** The regulation of such rates can not be split up according to the jurisdiction of the respective states over the track. There must be one rate fixed by one authority."

When this Court holds, as it did in the **Kirby case** (Kirby v. C. & A. R. R., 225 U. S. 155), that any unreasonable preference accorded to a shipper amounted to a discrimination under the Act to Regulate Commerce, it is difficult to see how the recurrent recoveries of large damages by the defendant in error, under the Missouri statute—which applies equally to intrastate and interstate shipments—would not constitute a flagrant violation of the Act to Regulate Commerce in thus awarding the defendant in error unreasonable discriminations, concessions and preferences not received by its competitors, or other shippers.

IV.

It is suggested in the brief of defendant in error (page 68) that the petition in the case at bar does not plead a cause of action for the recovery of a penalty. Defendant in error can not avoid the rulings of this Court in the case of

Ex parte Young, 209 U. S. 123,

and the other cases cited in the original brief of plaintiff in error by changing the theory upon which it proceeded in the trial court and in the Supreme Court of the State.

The petition clearly predicated a right of recovery under Section 3211 of the Revised Statutes of Missouri, because plaintiff prayed therein for a judgment for the alleged overcharges "and for damages not exceeding one thousand dollars and for all other and general relief **according to the statutes in such case made and provided**". The Supreme Court of Missouri found that the petition was predicated upon the Act of 1872, but said that, in view of the fact that the trial court denied the penalties asked and allowed only the difference between the higher rates charged plaintiff and the lower rates charged for longer distances, the judgment could be sustained under the Constitution, **provided that the section of the Constitution was self-enforcing.**

But, as has been heretofore noted, defendant rail-

way company derived the right to collect certain tolls and freight charges under a charter granted by the State in the year 1849, and in the absence of a showing that the charges so made were unreasonable, it could not be deprived of the right to make them, even under a provision of the Constitution subsequently enacted.

We, therefore, reiterate the propositions urged in the original brief, that the statutory penalties which were recovered in this case are unreasonable and oppressive, and the statute authorizing them in violation of the Fourteenth Amendment to the Constitution of the United States; that the Legislature of Missouri has no power arbitrarily to declare discrimination by railroads unjust, without regard to circumstances and conditions; that the Missouri statutory provisions involved in the case impose an unreasonable burden upon interstate commerce, and that to permit a judgment for the amount involved in this case to stand, without proof of any pecuniary loss sustained by the party alleged to have been aggrieved, is a taking of the property of the railway company without due process of law.

JAMES F. GREEN,
Attorney for Plaintiff in Error.

EDWARD J. WHITE,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
McGREW COAL COMPANY,
Defendant in Error.
No. 222.

In Error to the Supreme Court of the State of Missouri.

BRIEF OF PLAINTIFF IN ERROR.

EDWARD J. WHITE and
JAMES F. GREEN,
Counsel for Plaintiff in Error.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

THE MISSOURI PACIFIC RAILWAY COMPANY, *Plaintiff in Error,* vs. McGREW COAL COMPANY, *Defendant in Error.*	No. 222.

In Error to the Supreme Court of the State of Missouri.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT.

The defendant in error recovered judgment in the Circuit Court of Lafayette County, Missouri, June 19, 1912, for $16,504.19. This judgment was thereafter affirmed by the Supreme Court of the State of Missouri.

The suit was based upon the alleged violation by plaintiff in error of the provisions of Sections 3173 and 3211 of the Revised Statutes of the State of Missouri, 1909. The petition contains forty-seven counts or causes of action, and it is alleged in each of said counts that upon shipments of coal from the mines of the coal company at Myrick, Missouri, to various stations on the line of the railway, the coal company had been charged a higher rate per ton than was charged for shipments of coal between other points on the line of said railway for a greater distance.

These forty-seven counts of the petition are similar, except with regard to the allegations therein as to the points or stations between which the shipments were made, the weights of the coal, and the rate with which comparison is made, and it is therefore only necessary to print here the first count or cause of action stated, which (omitting formal parts) is as follows:

First Count of Petition.

"Plaintiff avers that on April, 1908, it was and still is a coal mining company incorporated under the laws of the State of Missouri.

"Plaintiff for first cause of action avers that on October, 1879, the defendant was and has been ever since a railroad corporation duly organized under

the law of said State and a common carrier for hire of freight and passengers between its stations hereinafter named in said State.

"That within five years last past and on the dates hereinafter named plaintiff produced and sold bituminous coal from its own mines near Myrick, one of defendant's stations in said county, and that on the various dates named in Exhibit No. 1 and in the cars therein described by number and initial, it shipped by defendant's road from said Myrick in the aggregate 867,000 pounds of its said coal in carload lots to the consignee named in said exhibit at Strasburg, Mo., another station on defendant's road.

"Plaintiff avers that for the said carriage of said coal defendant fixed, charged and demanded and received of the plaintiff 80 cents per ton, an illegal freight rate, being 30 cents per ton more than defendant was by law entitled to fix, demand, charge and receive, in this, that during all said times and dates herein named defendant had fixed, charged, demanded and received for the carriage for the same class of coal over its said line and over another part of said road from its station of Liberal, Mo., and to another of its said stations, viz, Granby, in said State, a distance of 77.14 miles, 50 cents per ton by the carload, while the distance from said Myrick to said Strasburg was only 61.95 miles, for which said rate of 80 cents per ton for said carriage fixed, charged,

demanded and received of plaintiff as aforesaid; and the same was illegal and exceeded the amount the defendant was entitled to fix, charge, demand and receive for said shipments by the sum of $130 and 5 cents.

"And the plaintiff avers that it is damaged and aggrieved by reason of said illegal freight charge in the sum of $130 and 5 cents; wherefore it prays judgment for the same and for damages not exceeding $1,000.00, and for all other and general relief, according to the statutes in such case made and provided."

To each of the counts of the petition the defendant answered as follows:

Answer to Each Count of Petition.

"Comes now the defendant and for its answer to the first count of plaintiff's petition, states that the same is founded upon the Session Laws of Missouri, 1872, page 69, now Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, and Section 12 of Article XII of the Constitution of Missouri, 1875, and that said sections are null and void and of no legal force and effect for the following reasons:

"*(a)* Because said Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, when enacted by the Legislature, were passed in violation of Sec-

tion 32 of Article IV of the Constitution of Missouri, 1865, in this: that the title of said Act of 1872, now Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, purports to prevent unjust discrimination in freight rates, whereas, the body of said act prohibits discrimination of all kinds without regard to whether the same is unjust or just and reasonable, and the subject of said act is not therefore clearly expressed in its title.

"*(b)* Because said sections 3173 and 3211 are repugnant to and in violation of Section 14 of Article XII of the Constitution of Missouri, 1875, in this: that said section of the Constitution provides for the passage of laws to correct abuses and prevent unjust discrimination and extortions in freight and passenger rates, and establishing reasonable maximum freight rates, whereas the body of said Act of 1872, now Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, prohibits discrimination of all kinds without regard to whether the same is unjust or just and reasonable, and fixes arbitrary, unfair and unreasonable maximum rates.

"*(c)* Because said Sections 3173 and 3211, Revised Statutes of Missouri, 1909, when re-enacted by the Legislature in 1879, were not legally re-enacted, but were enacted in violation of Section 28 of Article IV of the Constitution of Missouri, 1875, in this: that the title of said act as passed makes the same

appear to be an act to prevent unjust discrimination, whereas, the body of said act prohibits discrimination of all kinds without regard to whether the rates fixed are unjust or just and reasonable, and the subject of said act is not therefore clearly expressed in its title.

"*(d)* Because said Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, were repealed by an Act of Legislature passed in 1887, entitled, 'An Act to Regulate Railroad Corporations', passed at the extra session of 1887, same being found in the Session Laws of 1887, at page 15, now Sections 3185 and 3193 of the Revised Statutes, 1909.

"For further answer to said count, the defendant says that Section 12 of Article XII of the Constitution of Missouri, 1875, and Sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Missouri, 1909, are in violation of Section 1, Article XIV, of the Amendments to the Constitution of the United States in this: that said sections of the Constitution of Missouri and of the Revised Statutes of Missouri deprive defendant of its property without due process of law and deny to it the equal protection of the laws.

"For further answer to said count, the defendant says that Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, are repugnant to and in violation of Article V of the Amendments to the

Constitution of the United States in this: that said sections deprive the defendant of its property without due process of law.

"For further answer to said count, the defendant says that Sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Missouri, 1909, and Section 12 of Article XII of the Constitution of Missouri, 1875, are in conflict with Section 8 of Article I of the Constitution of the United States and the various laws passed by Congress thereunder in this: that the said defendant is engaged in interstate commerce and owns and operates various lines of railroad as a part of its system which run into other states than Missouri and into the States of Kansas, Colorado, Nebraska, Oklahoma, Illinois, Arkansas and Louisiana, and that the train in which the plaintiff's property described in said count was being transported was at the time engaged in interstate commerce and contained carload lots and shipments of merchandise consigned and being carried from points without the State of Missouri to points within this State, and from points within this State to points without the same and from points without this State across the State of Missouri and to points in other states, and that by reason of the premises this State is without jurisdiction to adopt and pass the sections herein named and to enforce the provis-

ions of the same against this defendant while so engaged in interstate commerce.

"For further answer to said count, the defendant says that Sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Missouri, 1909, and Section 12 of Article XII of the Constitution of Missouri, 1875, are in conflict with Section 8 of Article I of the Constitution of the United States and the various laws passed by Congress thereunder in this: that the defendant's railroad is an interstate road and its lines extend over and through the States of Missouri, Kansas, Colorado, Nebraska, Illinois, Oklahoma, Arkansas and Louisiana, and that it is engaged in interstate commerce over its said lines through all of said states and operates trains over the same in transporting freight and passengers through said states; that said section of the Constitution of Missouri and sections of the Revised Statutes seek to compel the defendant arbitrarily to fix its rates in this State and in all of said states and in comparison with rates existing in all such states without regard to the laws passed by Congress regulating interstate commerce.

"For further answer to said count the defendant denies each and every allegation therein contained.

"Wherefore, having fully answered, defendant prays to go hence with its costs."

Section 3173 of the Revised Statutes of the State of Missouri, 1909, on which plaintiff based its cause of action, is as follows:

> "Sec. 3173. **Freight Charges On, Regulated.**— No railroad corporation organized or doing business in this State, under any act of incorporation or general law of this State, now in force or which may be hereafter enacted, shall directly or indirectly charge or collect, for the transportation of goods, merchandise or property on its said road for any distance, any larger or greater amount, as toll or compensation, than is charged or collected for the transportation of similar quantities of the same class of goods, merchandise or property over a greater distance upon the same road, nor shall such corporation charge different rates for receiving, handling or delivering freight at different points on its road or roads connected therewith which it has a right to use, nor shall any such railroad corporation charge or collect, for the transportation of goods, merchandise or property over any portion of its road, a greater amount as toll or compensation than shall be charged or collected by it for the transportation of similar quantities of the same class of goods, merchandise or property over any other portion of its road of equal distance; and all such rules, regulations or by-laws of any railroad corporation, as fix, prescribe or establish any greater toll or compensation than is hereinbefore prescribed, are hereby declared to be void."

Section 3211 of the Revised Statutes of Missouri, 1909, is the provision of the Missouri law fixing the measure of recovery. That section is as follows:

> "Section 3211. **Penalty for Overcharge on Freight.**—Any railroad corporation which shall fix, demand, take or receive, from any person or persons, any greater toll or compensation for the transportation, receipt, handling or delivery of goods or merchandise, in violation of the provisions of this article, shall forfeit and pay for any such offense any sum not exceeding one thousand dollars, and costs of suit, including a reasonable attorney's fee, to be taxed by any court where the same is heard by appeal or otherwise, to be recovered by civil action by the party aggrieved, in any court having jurisdiction thereof; and any officer, agent or employe of any such railroad corporation who shall knowingly or willfully violate the provisions of this article shall be liable to the penalties prescribed in this section."

A motion was filed by plaintiff to strike out all of the portions of defendant's answer, except the general denial. This motion was sustained, and the case proceeded to trial. No evidence was offered on part of the plaintiff, except a stipulation, signed by counsel, which is as follows:

Stipulation.

"It is hereby stipulated between the parties that the defendant's stations, the rates charged by the

defendant, including those paid by the plaintiff, the amount of coal transported and the distances set out in the several counts of the petition are correctly stated therein.

"It is further stipulated that such coal was delivered by the plaintiff to the defendant for shipment in the usual and ordinary way, without any direction or request by plaintiff as to what particular trains the same was to be transported in, and that the defendant received and transported the same in the usual and ordinary course of business on the usual trains passing over its road.

"It is further agreed that the trains in which the defendant hauled said cars of coal contained other cars and shipments consigned from points within this State to points without the same, from points without the same to points within this State, and from points without this State, through this State and to points in other states."

In the case of McGrew v. The Missouri Pacific Railway Company, decided by the Supreme Court of Missouri *in banc*, at the October Term, 1910 (Record, p. 48), it appeared that the six Judges of the Supreme Court were divided equally in opinion, and a special Judge was called in, who wrote the opinion in the case affirming the judgment entered against the railway company in the court below. Judges Gantt, Valliant and Lamm concurred in the

opinion of Hall, Special Judge, and Fox, Chief Justice, and Judges Burgess and Woodson dissented.

On the appeal in the second case, decided at the October Term, 1913, a majority of the court followed the opinion of the court *in banc* in

McGrew v. Railway Company, 230 Mo. 496,

Graves, Judge, dissenting, and in the case now before this Court, the opinion by Blair, Judge, was concurred in by all of the Judges except Graves, Judge, who did not sit (Record, p. 43).

The assignments of error filed on behalf of the defendant (plaintiff in error in this Court), are as follows (caption omitted):

ASSIGNMENT OF ERRORS.

"Now comes The Missouri Pacific Railway Company, appellant, as a petitioner for a writ of error as set out in its petition, which is hereto attached, and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Missouri in the above-entitled cause there is manifest error in this, to-wit:

"1. That the Supreme Court of the State of Missouri erred in holding that Sections 3173 and 3211 and Sections 3185 and 3193, of the Revised Statutes of Missouri, 1909, are not in violation of Section 1, of Article XIV, of the Amendments to the Constitution of the United States in this, to-wit: That said sections of the Revised Statutes of Missouri deprived this appellant of its property without due process of law, and deny to it the equal protection of the law.

"2. That the Supreme Court of the State of Missouri, in its judgment and decision entered in this cause, erred in holding that Section 12, of Article XII, of the Constitution of Missouri, adopted in the year 1875, was not, and is not, in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States, in that said provision of the Constitution of the State of Missouri did not, and does not, deprive appellant railway com-

pany of its property without due process of law, nor deny to appellant the equal protection of the laws.

"3. Appellant avers that the decision of the Supreme Court of the State of Missouri and the judgment of said Court in this cause, in reaffirming and following the former decisions of the Supreme Court of Missouri in cases of McGrew v. Railway Company, reported in 258 Mo. 23, and McGrew v. Railway Company, reported in 230 Mo. 496, deprives this appellant of its property without due process of law, in violation of the fourteenth amendment to the Constitution of the United States.

"4. This appellant avers that Sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Missouri, 1909, and Section 12 of Article XII of the Constitution of the State of Missouri, 1875, are in conflict with Section 8 of Article I of the Constitution of the United States and various laws passed by Congress in this, to-wit: That appellant railway company is an interstate railroad and its lines extend over and through the States of Missouri, Kansas, Colorado, Nebraska, Illinois, Oklahoma, Arkansas and Louisiana, and that it is engaged in interstate commerce over its said lines through all of said states, and operates trains over its said lines in transporting freight and passengers through said states; that said sections of the

Revised Statutes of the State of Missouri and said section of the Constitution of Missouri above referred to seek to compel appellant railway company arbitrarily to fix rates for the transportation of freight in Missouri and in comparison with rates existing in all of said states, without regard to the laws passed by the Congress of the United States regulating interstate commerce; and the decision of the Supreme Court of Missouri, in holding valid the provisions of the Constitution of Missouri and the sections of the statutes of Missouri above referred to, denies to appellant the equal protection and benefit of the law, and deprives appellant of its property without due process of law, in violation of Section 1, of Article XIV, of the Amendments to the Constitution of the United States.

"5. Appellant avers that Sections 3173 and 3211 of the Revised Statutes of the State of Missouri prohibit discrimination in all cases, without regard to whether such discrimination is unjust or just and reasonable, and the decision of the Supreme Court of the State of Missouri in this cause in holding said sections of the statutes constitutional and valid deprives appellant of its property without due process of law, and denies to it the equal protection of the law, in violation of Section 1, of Article XIV of the Amendments to the Constitution of the United States.

"6. Appellant further says that the Supreme Court of Missouri erred in overruling appellant's motion for rehearing in this cause, in which motion it was averred that the decision of said Court denied to appellant the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

"7. That the Supreme Court of Missouri likewise erred in its decision construing Sections 3173 and 3211 of the Revised Statutes of Missouri in that said decision is opposed to divers decisions of the Supreme Court of the United States construing and interpreting similar statutes; the said decision of the Supreme Court of Missouri declaring that any discrimination in charges for the transportation of freight is unlawful, without regard to the question of competition or the circumstances and conditions attending the transportation of commodities.

BRIEF.

I.

Section 3211, Revised Statutes of Missouri, is unconstitutional and void, because the penalties authorized by it are unreasonable and oppressive, and the statute is in violation of the Fourteenth Amendment of the Constitution of the United States.

Ex parte Young, 209 U. S. 123;
Wilcox v. Consolidated Gas Co., 157 Fed. 881;
Wilcox v. Gas Company, 212 U. S., *l. c.* 53;
Cotting v. K. C. Stock Yards Co., 183 U. S. 100;
Mo. Pac. Ry. Co. v. Tucker, 230 U. S. 340;
Wadley Sou. Ry. v. Georgia, 235 U. S. 666.

The statute above mentioned does not provide a recovery for any sum as damages based upon the pecuniary loss to the party aggrieved, but provides that the railroad corporation which shall fix, demand or receive any toll or compensation in violation of the provisions of section 3173 "shall forfeit and pay for any such offense any sum not exceeding one thousand dollars and costs of suit, including a reasonable attorney's fee", etc. Said statute further provides that any officer or agent of any such railroad corporation, who shall knowingly or willfully violate the provisions of the sections con-

tained in the article shall also be liable to the penalties above named.

In this case, therefore, defendant in error (plaintiff below) recovered as penalties the sum of $16,504.19, without proof of any pecuniary injury sustained.

The statute under consideration in the case of

Consolidated Gas Co. v. City of New York, 157 Fed. Rep., p. 852,

contained a similar provision, to-wit: That a violation of any of its provisions "shall occasion the forfeiture of the sum of one thousand dollars for each offense to the People of the State". With reference to this provision, the District Judge said:

> "I am of the opinion that the penalty clauses in both statutes are clearly obnoxious to the remarks of Brewer, Judge, in Cotting v. Kansas City Stock Yards Company, 183 U. S. 79."

And this Court, in its review of the Gas Company case, *supra*, said (212 U. S., *l. c.* 53):

> "We are of the same opinion as to the penalties provided for a violation of the acts. They are not a necessary or inseparable part of the acts, without which they would not have been passed. If these provisions as to penalties have been properly construed by the Court below, they are undoubtedly void within the principle decided in *Ex parte Young*, 209 U. S. 123, and the

cases there cited, because so enormous and overwhelming in their amount."

In construing a statute of the State of Kansas establishing maximum rates for the transportation of certain products, which statute fixed five hundred dollars as liquidated damages in favor of the shipper for any excess charge, regardless of the amount thereof, this Court said in

Tucker v. The Mo. Pac. Ry. Co., 230 U. S., l. c. 348:

"It will be perceived that this liability is not proportioned to the actual damages. It is not as if double or treble damages are allowed as often is done—and as we think properly could have been done here—nor is it as if there would be difficulty in proving or ascertaining the actual damages, thereby furnishing a reason for prescribing a liquidated amount reasonably approximating the probable damages taking one case with another."

And again, after quoting

Ex parte Young, 209 U. S. 123,

this Court said (page 350):

"We think the liabilities and penalties imposed by the Kansas statute bring it within the controlling principle of that decision as applied to cases like the present. The imposition of five hundred dollars as liquidated dam-

ages is not only grossly out of proportion to the possible actual damages, but is so arbitrary and oppressive that its enforcement would be nothing short of the taking of property without due process of law, and therefore in contravention of the Fourteenth Amendment (see Waters-Pierce Oil Co. v. Texas, 212 U. S. 86-111; Standard Oil Co. v. Missouri, 224 U. S. 270-286). Upon this ground the judgment is reversed and the case is remanded for further proceedings not inconsistent with this opinion."

II.

Section 3173, Revised Statutes of Missouri, 1909, declares all discriminations unlawful whether the same be unjust or otherwise. The Legislature of the State has no power arbitrarily to declare all discrimination by railroads unjust.

Sections 3173 and 3211, Revised Statutes of Missouri, 1909, were Sections 1 and 4, respectively, of the Act of the General Assembly of the State passed in the year 1872. At that time there was no provision of the Constitution of Missouri relating to the question of discrimination by common carriers, the Constitution of 1865 being silent on that subject. The common law which prevailed prohibited all unjust and unreasonable discrimination, but allowed reasonable and just discrimination to be made. The title of the Act of 1872 was as follows:

> "An Act to prevent unjust discrimination and extortion in the rates to be charged by the different railroads in this State for the transportation of freights on said roads."

The material provisions of Section 3173 make it unlawful for common carriers: first, to charge more for a short than a long haul; and, second, to charge more for one haul than for a like haul of equal distance.

Section 4 of the Act of 1872, which is Section 3211 of the present Revised Statutes, declares violations thereof subject to a penalty of one thousand dollars and attorney's fees.

Section 9 of Article XI of the Constitution of Missouri, adopted in the year 1875, provides that:

> "The General Assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads of this State."

That a discrimination may be just is recognized in Section 2 of the Act of Congress in declaring what shall be deemed unjust discrimination.

Commerce Commission v. Railroad,
145 U. S. 263.

It was not the purpose of the act to prohibit a just discrimination in the transportation of persons or of property.

United States v. Railroad, 127 Fed. 785.

In a recent case involving the establishing of coal rates in the State of Missouri on tariff schedules filed by this defendant carrier the Public Service Commission of the State said:

> "We shall not attempt to enter upon a discussion of the law as set forth in the McGrew cases. It is sufficient to say that Section 12 of Article XII of the Constitution of this State provides as follows:
>
> "'It shall not be lawful in this State for any railway company to charge for freight or passengers a greater amount for the transportation of the same for a less distance than the amount charged for any greater distance, and suitable laws shall be passed by the General Assembly to enforce this provision, but excursion and commutation tickets may be issued at special rates.'
>
> "We have taken the time to examine the constitutional debates and the reasons set forth for the adoption of the above section of our Constitution. We find that when it was up for consideration on the afternoon of the sixty-first day of the session the following explanation took place:
>
> "'Mr. Wagner: I would call attention to this section. It says: "It shall be unlawful in this State for any railway company to charge for freight or passengers a greater amount for the transportation of the same for a less distance than the amount charged for any greater dis-

tance." It means at a greater rate, I presume, although it does not say it.

"'Mr. Priest: No, it does not mean that. I will tell you what it means. Railroads are frequently in the habit of charging more for a less distance for a car than they are for a greater distance, and the idea is that they shall not charge a greater amount for a less distance than they do for a greater distance.'"

Following the explanation by Mr. Priest, the record shows that said section was adopted.

"We think that it is too plain for argument that, under the provision of this section, **that a railroad may charge as great an amount for a less distance as they do for a greater distance.** As stated by Mr. Priest, the idea is that they shall not charge a greater amount for a less distance than they do for a greater distance. In other words, the Constitution permits a railway company **to charge as much** for hauling freight or passengers for a less distance than it does for a greater distance. For example, we think, under this provision of our Constitution, a railroad company may charge as much for hauling a carload of coal fifty miles as it charges for hauling another carload one hundred miles, but it can not charge more for the fifty-mile haul than it does for the hundred-mile haul."

In the same case, the Missouri Public Service Commission further said:

"It has been found in actual practice that a mileage schedule of rates on coal can not be successfully applied, but that the so-called blanket or zone system must be used. * * * Supplying a market like Kansas City—possibly one of the largest in the West—it is found that coal is produced at various distances, and generally speaking, in all directions. If the closest mine to Kansas City is located some forty miles distant and in Kansas, while another mine is located on another road some fifty-two miles distant, in Missouri, it naturally follows that the supplying of the market will be met with the coal from the closest mine, if a mileage schedule of rates is adopted, and that it would mean that the line handling the coal from the Missouri mine would be deprived of the revenue produced by the handling of that traffic, unless it met the rate of the Kansas company."

The strict enforcement of the provisions of Section 3173 would confiscate the property of every common carrier and drive them all from the State of Missouri; yet, at the same time, it would benefit no one. Such a law, therefore, is violative of the Fourteenth Amendment to the Constitution of the United States.

For illustration, the City of Joplin, Missouri, with thirty-five thousand inhabitants, is located within twenty miles of the coal fields of Pittsburg, Kansas, and eighty-three miles from the coal mines of Rich Hill, Missouri. The railroad company, being pro-

hibited from charging more for a shorter than a longer haul under all conditions and circumstances, could not, under the statute quoted, give a reduced rate from Rich Hill to Joplin to compete with the coal mines of Kansas, and thirty-five thousand citizens of Joplin must be deprived of the benefit of the competition which would otherwise exist between the coal mines of Rich Hill, Missouri, and of Pittsburg, Kansas, because of the provisions of the Missouri statute.

In the dissenting opinion of Judges Woodson, Fox and Burgess of the Missouri Supreme Court, 230 Mo. (Rec., p. 105), it is said:

> "When traffic is not of like kind, or when the service is not like and contemporaneous, or when the transportation is not rendered under substantially similar circumstances and conditions, difference in charges does not constitute unjust discrimination within the meaning of Section 2 of the Act (Interstate Commerce Commission v. Railroad, 43 Fed. 37). The language of the act recognizes that a uniform rate between different shippers is not always possible or proper; that the time of service, the kind of traffic, and the circumstances and conditions under which it is transported may materially change the just obligations and duties of the carrier to its patrons (United States v. Hanley, 71 Fed. 672). A carrier, subject to the act, is only bound to give the same terms to all persons alike, under the

same conditions and circumstances. Any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge (Commerce Commission v. Railroad, 141 Fed. 1003-1014). In fixing rates for differing but analogous services, the carrier has the right to exercise an honest discretion. Trifling differences of cost or character of services rendered do not justify disparity of charges, but, where the differences are substantial, either in the work to be performed or in the utility and value to the persons served, a fair relation of rates meets the carrier's obligation (Carr v. Railroad, 9 I. C. C. R. 1). Discrimination to be unlawful must be unjust. All discriminations between persons are not unlawful under section 2 of the act, but only such as are unjust (Interstate Commerce Commission v. Railroad, 43 Fed. 47). It is not all discriminations that fall within the inhibition of the act, but only such as are unjust or unreasonable (Interstate Commerce Commission v. Railroad, 145 U. S. 263).

"What constitutes unjust discrimination? In order to constitute unjust discrimination under section 2 of the act the carrier must charge or receive directly from one person a greater or less compensation than from another, or must accomplish the same thing indirectly by means of a special rate, rebate or other device, but, in either case, it must be for a 'like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions' (Interstate Commerce Commission v. Railroad, 145 U. S. 281.)"

With reference to the results likely to follow from the enforcement of the provisions of the Missouri statutes, the dissenting judges in this case said (Rec., p. 100):

> "Counsel for defendant, in arguing this cause, stated that, if the long and short haul of the statute as understood by counsel for plaintiff was observed, the annual loss of about six hundred thousand dollars would be entailed upon his client. While that statement is no part of the record, yet we may use it for the purpose of illustrating the question in hand, and the great loss that would be visited upon defendant, if that rule is to be enforced, and, if capitalized at four per cent, it would be equivalent to wiping out of existence about fifteen million dollars' worth of defendant's property, and that, too, with no corresponding benefit to any one, but a positive injury to the competitive towns as before shown. And that is not all. The same proportionate loss would be entailed upon all other railroads in this State."

III.

The enforcement of the provisions of the Missouri statute would impose an unreasonable burden upon interstate commerce.

Wabash R. R. Co. v. Ill., 118 U. S. 557;
Wilmington Transportation Co. v. R. R. Commission, 236 U. S. 155.

IV.

Section 3173 of the Revised Statutes of Missouri, 1909, and the enforcement of the provisions of said section by the Supreme Court of Missouri deprive defendant railway company of its property without due process of law, and deny to it the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

International Coal Co. v. Railroad, 230 U. S. 184;

Elliott on Railroads, Vol. II, Sec. 686;

Hutchinson on Carriers, 3rd Ed., Vol. II, Sec. 574;

Ragen v. Farmers' Loan and Trust Co., 154 U. S. 362;

C., M. & St. P. R. R. v. State of Minn., 134 U. S. 418;

Smyth v. Ames, 169 U. S. 466;

Sharpless v. Lawrence, 213 Fed. Rep. 427;

Homestead Co. v. Electric Co., 226 Fed. Rep. 53;

Lehigh Valley R. R. Co. v. American Hay Co., 219 Fed. Rep. 541.

It will be noted that, although the petition of the coal company alleged that

> "The plaintiff avers that it is damaged and aggrieved by reason of said illegal freight charge in the sum of $130.05,"

there was no proof offered in the case showing

wherein plaintiff had sustained any damages, and the Court proceeded upon the theory that the mere fact that a rate was charged plaintiff for the transportation of a commodity between two points and a different rate charged some other shipper for the transportation of like commodities between two other points of less distance, entitled the plaintiff to a recovery without regard to the circumstances or the competitive conditions incident to the transportation, and without proof as to the **pecuniary loss** sustained. At the hearing in the Supreme Court of Missouri, a like conclusion was reached, that Court saying:

> "A stipulation was filed **which settled all the facts** in accordance with the allegations of the petition."

The stipulation, however, contained nothing by way of admission that plaintiff had sustained **any damage or loss** in consequence of the transportation of the coal shipped by it, it being stated in the stipulation:

> "That the defendant's stations, the rates charged by the defendant, including those paid by the plaintiff, the amount of coal transported, and the distances set out in the several counts of the petition are correctly stated therein."

In the case of

Penn. R. R. Co. v. International Coal Co., 230 U. S., l. c. 197,

this Court said:

> "But although this suit was brought to enforce a cause of action given by this section to any person injured, it is a noticeable fact that in its pleading the plaintiff does not claim to have been damaged, and there is neither allegation nor proof that it suffered any injury. It contends, however, that this was not necessary, for the reason that, as a matter of law, it was entitled to recover as damages the same rate per ton on all of plaintiff's shipments as had been rebated any other person on any of his tonnage shipped at the same time, over the same route. And such a right of action was expressly given in Section 2 of the original **Bill to Regulate Commerce**, which as it passed the Senate May 12, 1886, did provide that the carrier 'shall be liable to all persons who have been charged a higher rate than was charged any other person or persons for the difference between such higher rate and the lowest rate charged upon like shipments during the same period; or if such lower rate was made on any time contract or understanding, the said common carrier shall be liable to pay a like rebate or drawback to all other shippers over the same route between the same points who have shipped goods during the time that such contract or understanding was in operation.
>
> "The fact that this provision measuring the amount of recovery by rebate was omitted from

the act, as finally reported to both houses and passed, is not only significant, but so conclusive against the contention of the plaintiff that it quotes—not the report of the conference committee—but a statement made by a member of the Senate Conference Committee," etc.

And further on in the same case this Court said:

"This conclusion that the right to recover is limited to the pecuniary loss suffered and proved is demanded by the language of the statute, the construction put upon it years ago in the Parsons case, and is the view taken in the only other case we find in which this question, under the Act to Regulate Commerce, has been construed. In Knudsen v. Michigan Central R. R., 148 Fed. Rep. 968-974, it was said by the Circuit Court of Appeals for the Eighth Circuit that to 'support a recovery under this section there must be a showing of some specific pecuniary injury. A cause of action does not necessarily arise from those acts or omissions of a common carrier that may subject it to a criminal prosecution by the Government or to corrective or coercive proceedings at the instance of the Commission.' A similar principle was applied in Meeker v. Lehigh Valley R. R., 183 Fed. Rep. 548, and in Central Coal Co. v. Hartman, 111 Fed. Rep. 96, where the suit was to recover damages caused by a violation of the Anti-Trust Act.

"Another case, on facts quite like those here involved, is that of **Hoover v. Pennsylvania R. R.**, **156 Pa. St. 220**, where the statute, like the Com-

merce Act, gave the party injured a right of action for damages suffered. In violation of the State law the railroad allowed a manufacturing company a rebate of twenty cents a ton on coal shipped. In a suit for the recovery of damages the trial court charged the jury that the difference between the high and low rate was the measure of recovery. This was reversed, the Court saying (p. 244): 'The amount of injury suffered is the measure of the single damages to be allowed. But it does not at all follow that the amount of injury suffered is the difference in the rates charged. It might be, or it might not be, **but, in any event, it must be a subject of proof.** * * * It does not appear that the plaintiffs sold their coal for any less than the current market price, except when they and the other dealers were engaged in a war of prices and sold it far below the actual cost, in a struggle to capture the market.'

"In view of the express provisions of Section 8 of the Act to Regulate Commerce, it was error to refuse to charge that 'to entitle the plaintiff to recover the jury must be satisfied that it sustained some loss or injury due to the fact that the defendant was carrying at the same time, at lower rates, coal shipped by other shippers."

In the case of

Sharpless v. Lawrence, 213 Fed. Rep. 427,

the Court said:

"The word 'damage' as a word of art has a clear and definite legal meaning. It is defined by

Bouvier to be 'the indemnity recoverable by a person who has sustained an injury, either in his person, property or relative rights, through the act or default of another'. The word has also been defined as 'a sum of money adjudicated to be paid by some person to another as a compensation for loss sustained by the latter in consequence of an injury committed by the former'. These and other definitions given by the courts, though in varying language, include the concept of indemnity or compensation for actual loss. It is a legal term of clear import, and an unnecessary and harmful confusion of thought would ensue from treating it otherwise. In the recent case of Penn. R. R. v. International Coal Co., 230 U. S. 184, the Supreme Court of the United States, in dealing with the Eighth Section of the Act to Regulate Commerce, giving a right of action to a shipper injured by an act of a common carrier prohibited by the statute and making 'such common carrier * * * liable to the person injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of the act', used this significant language: 'The statute gives a right of action for damages to the injured party, and by the use of these legal terms clearly indicates that the damages recoverable were those known to the law and intended as compensation for the injury sustained.' We are of opinion, therefore, that this Court, in affirming the decree of the court below, 'that the complainant recover of defendant the damages sustained by said complainant from the unlawful acts of

the defendant herein adjudged' did not and could not do otherwise than impute to the words 'damages sustained by said complainant' the legal meaning attaching thereto as above indicated."

And Wade, District Judge, in

Homestead Company v. Electric Company, 226 Fed. 53,

said:

"As a general proposition, I do not think that the difference in rate is the measure of damages. I think a great deal of confusion has arisen by failing to keep in mind the real basis of the cause of action for damages. The injured person was not injured by reason of the higher rate charged to him, it being conceded that such rate was reasonable. If he has been damaged it is because of the lower rate charged his competitor, and, this being true, the difference between such lower rate and the higher rate charged a competitor can not always measure the loss actually sustained as a direct result of the discrimination.

"In this case the plaintiff was engaged in 'printing a weekly newspaper and doing a job printing and electrotyping business'. Its competitor was 'engaged in running a newspaper and job printing plant in said city under like conditions'. Suppose that each was running a weekly newspaper, differing in politics and policies. Each would have its own circle of subscribers and readers. While in a sense the par-

ties would be competitors, yet they are not competitors in such a sense as that the difference in the rate charged for electricity would be the true measure of damages arising out of the fact that one received a lower rate than the other. If the other party was entitled to a lower rate, as a matter of law, then, of course, the difference between that and the higher rate would be the true measure; but, when the damages to be recovered must be the direct and proximate result of the lower rate, it must follow that the difference in rate is not the true test as applied to such case.

"The Supreme Court of the United States, in Pennsylvania Company v. Coal Co., 230 U. S. 184, fully reviews all the authorities, and upon this matter of damages says: 'But it does not at all follow that the amount of injury suffered is the difference in the rates charged. It might be, or it might not be; but, in any event, it must be the subject of proof.' "

The United States Circuit Court of Appeals said, in

Lehigh Valley R. R. Co. v. American Hay Company, 219 Fed. Rep. 541:

"Finally it is contended that in an action under section 16 of the act there must be proof of damages sustained, and that such proof is lacking here.

"As a matter of first impression, it would seem that when one shipper is made to pay to a railroad, through discrimination either in rebates or

in charges for special services, a definitely ascertained larger sum than his competitors are charged for transportation of goods, he is damaged to that amount, or at least there is a *prima facie* showing of damages sustained by himself. Two decisions of the Court of Appeals for the Third Circuit are to the contrary of this proposition (Lehigh Valley Railroad v. Clark, 207 Fed. 717, 125 C. C. A. 235; Lehigh Valley Railroad v. Meeker, 211 Fed. 785, 128 C. C. A. 311), and it seems to us that the decision of the Supreme Court in Pennsylvania Railroad v. International Coal Co., 230 U. S. 184, 33 Sup. Ct. 893, 57 L. Ed. 1446, requires the same conclusion. In that case by means of rebates given to others and refused to itself the shipper had been charged for transportation a greater sum than was collected from its competitors. The amount of the excess was determined and the fact that it was paid to the railroad was proved. The Court said: 'But the plaintiff may have sold at the usual profit all or part of its 40,000 tons at the regular market price; the purchaser, on his own account, paying freight to the point of delivery. In that event, not the shipper, but the purchaser, who paid the freight, would have been the person injured, if any damage resulted from giving rebates.'

"The facts in the case at bar seem to us indistinguishable from those in the case last cited. It is not enough to show that the American Hay Company paid the railroad these various items of $2; for aught that appears the persons to whom it sold may have themselves paid all those

charges, or some of them, or some part of each charge. Just how the initial payment of each $2 resulted in damages to the company, if it were damaged, is a matter wholly within the knowledge of the hay company, and not presumably within the knowledge of the railroad company. Proof that damages did result from the initial payment is part of the plaintiff's case, and, without affirmative proof to show such damages, it was not entitled to a verdict.

"The judgment is reversed."

V.

Plaintiff sought a recovery on the ground that one rate was charged for the transportation of coal over defendant's line in one part of the state, and a different rate over another portion of the road, without regard to the circumstances and conditions surrounding such transportation. To allow a recovery in damages in such a case is a taking of property without due process of law.

Central Coal & Coke Co. v. Hartman, 111 Fed. 96;
Knudsen Fruit Co. v. Railroad, 148 Fed. 974;
Hoover v. Penn. Ry. Co., 156 Pa. St. 220;
Parsons v. Railroad, 167 U. S. 447.

In the petition of the coal company in the case at bar it is alleged that it is **damaged and aggrieved** by reason of the illegal freight charge in the sum of

$130.05, and judgment is prayed for that amount "and for damages not exceeding one thousand dollars". The statute upon which the action is predicated only authorizes the recovery of a **penalty**, it being declared therein that the offending railroad corporation "**shall forfeit and pay for any such offense any sum not exceeding one thousand dollars** and costs of suit, including a reasonable attorney's fee, etc.," and, as it is clear, under the authorities herein cited, that defendant in error has recovered a judgment aggregating $16,504.19 without proof of any damages sustained, it is respectfully submitted that said judgment should be reversed.

EDWARD J. WHITE and
JAMES F. GREEN,
Counsel for Plaintiff in Error.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

McGREW COAL COMPANY,
Defendant in Error.

No. 601 222

In Error to the Supreme Court of the State of Missouri.

BRIEF FOR PLAINTIFF IN ERROR IN OPPOSITION TO MOTION TO AFFIRM FILED BY DEFENDANT IN ERROR.

EDWARD J. WHITE and
JAMES F. GREEN,
Counsel for Plaintiff in Error.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

THE MISSOURI PACIFIC RAILWAY COMPANY, *Plaintiff in Error,* vs. McGREW COAL COMPANY, *Defendant in Error.*	No. 601.

In Error to the Supreme Court of the State of Missouri.

BRIEF FOR PLAINTIFF IN ERROR IN OPPOSITION TO MOTION TO AFFIRM FILED BY DEFENDANT IN ERROR.

STATEMENT.

Defendant in error recovered judgment in the Circuit Court of Lafayette County, Missouri, June 19, 1912, for $16,504.19. Said judgment was thereafter

affirmed by the Supreme Court of the State of Missouri.

There were forty-seven counts or causes of action stated in the petition, but, as they were similar, only the first count is here inserted. That count is as follows:

First Count of Petition.

"Plaintiff avers that on April, 1908, it was and still is a coal mining company incorporated under the law of the State of Missouri.

"Plaintiff for first cause of action avers that on October, 1879, the defendant was and has been ever since a railroad corporation duly organized under the law of said State and a common carrier for hire of freight and passengers between its stations hereinafter named in said State.

"That within five years last past and on the dates hereinafter named plaintiff produced and sold bituminous coal from its own mines near Myrick, one of defendant's stations in said county, and that on the various dates named in Exhibit No. 1 and in the cars therein described by number and initial, it shipped by defendant's road from said Myrick in the aggregate 867,000 pounds of its said coal in car load lots to the consignee named in said exhibit at Strasburg, Mo., another station on defendant's road.

"Plaintiff avers that for the said carriage of said

coal defendant fixed, charged and demanded and received of the plaintiff 80 cents per ton, an illegal freight rate, being 30 cents per ton more than defendant was by law entitled to fix, demand, charge and receive, in this, that during all said times and dates herein named defendant had fixed, charged, demanded and received for the carriage for the same class of coal over its said line and over another part of said road from its station of Liberal, Mo., and to another of its said stations, viz, Granby, in said State, a distance of 77.14 miles, 50 cents per ton by the car load, while the distance from said Myrick to said Strasburg was only 61.95 miles, for which said rate of 80 cents per ton for said carriage fixed, charged, demanded and received of plaintiff as aforesaid; and the same was illegal and exceeded the amount the defendant was entitled to fix, charge, demand and receive for said shipments by the sum of $1.30 and 5 cents.

"And the plaintiff avers that it is damaged and aggrieved by reason of said illegal freight charge in the sum of $1.30 and 5 cents; wherefore it prays judgment for the same and for damages not exceeding $1,000.00, and for all other and general relief, according to the statutes in such case made and provided."

To each of the counts of the petition the defendant answered as follows:

Answer to Each Count of Petition.

"Comes now the defendant and for its answer to the first count of plaintiff's petition, states that the same is founded upon the Session Laws of Missouri, 1872, page 69, now Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, and Section 12 of Article XII of the Constitution of Missouri, 1875, and that said sections are null and void and of no legal force and effect for the following reasons:

"*(a)* Because said Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, when enacted by the Legislature, were passed in violation of Section 32 of Article IV of the Constitution of Missouri, 1865, in this: that the title of said Act of 1872, now Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, purports to prevent **unjust** discrimination in freight rates, whereas, the body of said act prohibits discrimination of all kinds without regard to whether the same is unjust or just and reasonable, and the subject of said act is not therefore clearly expressed in its title.

"*(b)* Because said sections 3173 and 3211 are repugnant to and in violation of Section 14 of Article XII of the Constitution of Missouri, 1875, in this: that said section of the Constitution provides for the passage of laws to correct abuses and prevent **unjust** discrimination and extortions in freight and passenger

rates, and establishing reasonable maximum freight rates, whereas the body of said Act of 1872, now Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, prohibits discrimination of all kinds without regard to whether the same is unjust or just and reasonable, and fixes arbitrary, unfair and unreasonable maximum rates.

"*(c)* Because said Sections 3173 and 3211, Revised Statutes of Missouri, 1909, when re-enacted by the Legislature in 1879, were not legally re-enacted, but were enacted in violation of Section 28 of Article IV of the Constitution of Missouri, 1875, in this: that the title of said act as passed makes the same appear to be an act to prevent **unjust** discrimination, whereas, the body of said act prohibits discrimination of all kinds without regard to whether the rates fixed are unjust or just and reasonable, and the subject of said act is not therefore clearly expressed in its title.

"*(d)* Because said Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, were repealed by an Act of Legislature passed in 1887, entitled, 'An Act to Regulate Railroad Corporations', passed at the extra session of 1887, same being found in the Session Laws of 1887, at page 15, now Sections 3185 and 3193 of the Revised Statutes, 1909.

"For further answer to said count, the defendant says that Section 12 of Article XII of the Constitution of Missouri, 1875, and Sections 3173 and 3211 and

Sections 3185 and 3193 of the Revised Statutes of Missouri, 1909, are in violation of Section 1, Article XIV, of the Amendments to the Constitution of the United States in this: that said sections of the Constitution of Missouri and of the Revised Statutes of Missouri deprive defendant of its property without due process of law and denies to it the equal protection of the laws.

"For further answer to said count, the defendant says that Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, are repugnant to and in violation of Article V of the Amendments to the Constitution of the United States in this: that said sections deprive the defendant of its property without due process of law.

"For further answer to said count, the defendant says that Sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Missouri, 1909, and Section 12 of Article XII of the Constitution of Missouri, 1875, are in conflict with Section 8 of Article I of the Constitution of the United States and the various laws passed by Congress thereunder in this: that the said defendant is engaged in interstate commerce and owns and operates various lines of railroad as a part of its system which run into other states than Missouri and into the States of Kansas, Colorado, Nebraska, Oklahoma, Illinois, Arkansas and Louisiana, and that the train in which the plaintiff's property

described in said count was being transported was at the time engaged in interstate commerce and contained carload lots and shipments of merchandise consigned and being carried from points without the State of Missouri to points within this State, and from points within this State to points without the same and from points without this State across the State of Missouri and to points in other states, and that by reason of the premises this State is without jurisdiction to adopt and pass the sections herein named and to enforce the provisions of the same against this defendant while so engaged in interstate commerce.

"For further answer to said count, the defendant says that Sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Missouri, 1909, and Section 12 of Article XII of the Constitution of Missouri, 1875, are in conflict with Section 8 of Article I of the Constitution of the United States and the various laws passed by Congress thereunder in this: that the defendant's railroad is an interstate road and its lines extend over and through the States of Missouri, Kansas, Colorado, Nebraska, Illinois, Oklahoma, Arkansas and Louisiana, and that it is engaged in interstate commerce over its said lines through all of said states and operates trains over the same in transporting freight and passengers through said states; that said section of the Constitution of Missouri and sec-

tions of the Revised Statutes seek to compel the defendant arbitrarily to fix its rates in this State and in all of said states and in comparison with rates existing in all such states without regard to the laws passed by Congress regulating interstate commerce.

"For further answer to said count the defendant denies each and every allegation therein contained.

"Wherefore, having fully answered, defendant prays to go hence with its costs."

Section 3173 of the Revised Statutes of the State of Missouri, 1909, on which plaintiff based its cause of action, is as follows:

> "Sec. 3173. **Freight, Charges On, Regulated.**—No railroad corporation organized or doing business in this State, under any act of incorporation or general law of this State, now in force or which may be hereafter enacted, shall directly or indirectly charge or collect, for the transportation of goods, merchandise or property on its said road for any distance, any larger or greater amount, as toll or compensation, than is charged or collected for the transportation of similar quantities of the same class of goods, merchandise or property over a greater distance upon the same road, nor shall such corporation charge different rates for receiving, handling or delivering freight at different points on its road or roads connected therewith which it has a right to use, nor shall any such railroad corporation charge or collect, for the transportation of goods, merchandise or property over

any portion of its road, a greater amount as toll or compensation than shall be charged or collected by it for the transportation of similar quantities of the same class of goods, merchandise or property over any other portion of its road of equal distance; and all such rules, regulations or by-laws of any railroad corporation, as fix, prescribe or establish any greater toll or compensation than is hereinbefore prescribed, are hereby declared to be void."

Section 3211 of the Revised Statutes of Missouri, 1909, is the provision of the Missouri law fixing, as plaintiff claims, the measure of damages to which it is entitled. That section is as follows:

"Section 3211. **Penalty for Overcharges on Freight.**—Any railroad corporation which shall fix, demand, take or receive, from any person or persons, any greater toll or compensation for the transportation, receipt, handling or delivery of goods or merchandise, in violation of the provisions of this article, shall forfeit and pay for any such offense any sum not exceeding one thousand dollars, and costs of suit, including a reasonable attorney's fee, to be taxed by any court where the same is heard by appeal or otherwise, to be recovered by civil action by the party aggrieved, in any court having jurisdiction thereof; and any officer, agent or employe of any such railroad corporation who shall knowingly or willfully violate the provisions of this article shall be liable to the penalties prescribed in this section."

A motion was filed by plaintiff to strike out all of the portions of defendant's answer, except the general denial. This motion was sustained, and the case proceeded to trial. No evidence was offered on part of the plaintiff, except a stipulation, signed by counsel, which is as follows:

Stipulation.

"It is hereby stipulated between the parties that the defendant's stations, the rates charged by the defendant, including those paid by the plaintiff, the amount of coal transported and the distances set out in the several counts of the petition are correctly stated therein.

"It is further stipulated that such coal was delivered by the plaintiff to the defendant for shipment in the usual and ordinary way, without any direction or request by plaintiff as to what particular trains the same was to be transported in, and that the defendant received and transported the same in the usual and ordinary course of business on the usual trains passing over its road.

"It is further agreed that the trains in which the defendant hauled said cars of coal contained other cars and shipments consigned from points within this State to points without the same, from points without the same to points within this State, and from

points without this State, through this State and to points in other states."

In the case of McGrew v. The Missouri Pacific Railway Company, decided by the Supreme Court of Missouri *in banc*, at the October Term, 1910 (Record, p. 48), it appeared that the six Judges of the Supreme Court were divided equally in opinion, and a special Judge was called in, who wrote the opinion in the case affirming the judgment entered against the railway company in the court below. Judges Gantt, Valliant and Lamm concurred in the opinion of Hall, Special Judge, and Fox, Chief Justice, and Judges Burgess and Woodson dissented.

On the appeal in the second case, decided at the October Term, 1913, a majority of the court followed the opinion of the court *in banc* in

McGrew v. Railway Company, 230 Mo. 496,

Graves, Judge, dissenting, and in the case now before this Court, the opinion by Blair, Judge, was concurred in by all of the Judges except Graves, Judge, who did not sit (Record, p. 43).

The assignments of error filed on behalf of the defendant (plaintiff in error in this Court), are as follows (caption omitted):

ASSIGNMENT OF ERRORS.

"Now comes The Missouri Pacific Railway Company, appellant, as a petitioner for a writ of error as set out in its petition, which is hereto attached, and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Missouri in the above-entitled cause there is manifest error in this, to-wit:

"1. That the Supreme Court of the State of Missouri erred in holding that Sections 3173 and 3211 and Sections 3185 and 3193, of the Revised Statutes of Missouri, 1909, are not in violation of Section 1, of Article XIV, of the Amendments to the Constitution of the United States in this, to-wit: That said sections of the Revised Statutes of Missouri deprived this appellant of its property without due process of law, and deny to it the equal protection of the law.

"2. That the Supreme Court of the State of Missouri, in its judgment and decision entered in this cause, erred in holding that Section 12, of Article XII, of the Constitution of Missouri, adopted in the year 1875, was not, and is not, in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States, in that said provision of the Constitution of the State of Missouri did not, and does not, deprive appellant railway company of its property without due

process of law, nor deny to appellant the equal protection of the laws.

"3. Appellant avers that the decision of the Supreme Court of the State of Missouri and the judgment of said Court in this cause, in reaffirming and following the former decisions of the Supreme Court of Missouri in cases of McGrew v. Railway Company reported in 258 Mo. 23, and McGrew v. Railway Company, reported in 230 Mo. 496, deprives this appellant of its property without due process of law, in violation of the fourteenth amendment to the Constitution of the United States.

"4. This appellant avers that Sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Missouri, 1909, and Section 12 of Article XII of the Constitution of the State of Missouri, 1875, are in conflict with Section 8 of Article I of the Constitution of the United States and various laws passed by Congress in this, to-wit: That appellant railway company is an interstate railroad and its lines extend over and through the States of Missouri, Kansas, Colorado, Nebraska, Illinois, Oklahoma, Arkansas and Louisiana, and that it is engaged in interstate commerce over its said lines through all of said states, and operates trains over its said lines in transporting freight and passengers through said states; that said sections of the Revised Statutes of the State of Missouri and said section of the Constitution of Missouri above referred

to seek to compel appellant railway company arbitrarily to fix rates for the transportation of freight in Missouri and in comparison with rates existing in all of said states, without regard to the laws passed by the Congress of the United States regulating interstate commerce; and the decision of the Supreme Court of Missouri, in holding valid the provisions of the Constitution of Missouri and the sections of the statutes of Missouri above referred to, denies to appellant the equal protection and benefit of the law, and deprives appellant of its property without due process of law, in violation of Section 1, of Article XIV, of the Amendments to the Constitution of the United States.

"5. Appellant avers that Sections 3173 and 3211 of the Revised Statutes of the State of Missouri prohibit discrimination in all cases, without regard to whether such discrimination is unjust or just and reasonable, and the decision of the Supreme Court of the State of Missouri in this cause in holding said sections of the statutes constitutional and valid deprives appellant of its property without due process of law, and denies to it the equal protection of the law, in violation of Section 1, of Article XIV of the Amendments to the Constitution of the United States.

"6. Appellant further says that the Supreme Court of Missouri erred in overruling appellant's motion for rehearing in this cause, in which motion it was averred that the decision of said Court denied to appellant the

equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

"7. That the Supreme Court of Missouri likewise erred in its decision construing Sections 3173 and 3211 of the Revised Statutes of Missouri in that said decision is opposed to divers decisions of the Supreme Court of the United States construing and interpreting similar statutes; the said decision of the Supreme Court of Missouri declaring that any discrimination in charges for the transportation of freight is unlawful, without regard to the question of competition or the circumstances and conditions attending the transportation of commodities.

BRIEF.

Section 3173 of the Revised Statutes of Missouri, 1909, and the enforcement of the provisions of said section by the Supreme Court of Missouri deprive defendant railway company of its property without due process of law, and deny to it the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

> International Coal Co. v. Railroad, 230 U. S. 184;
> Elliott on Railroads, Vol. II, Sec. 686;
> Hutchinson on Carriers, 3d Ed., Vol. II, Sec. 574;
> Ragen v. Farmers' Loan and Trust Co., 154 U. S. 362;
> C., M. & St. P. R. R. v. State of Minn., 134 U. S. 418;
> Smyth v. Ames, 169 U. S. 466.

It will be noted that, although the petition of the coal company alleged that

> "The plaintiff avers that it is damaged and aggrieved by reason of said illegal freight charge in the sum of $130.05,"

there was no proof offered in the case showing wherein plaintiff had sustained any damages, and the Court proceeded upon the theory that the mere fact that a rate was charged plaintiff for the transportation of a commodity between two points and a different rate charged some other shipper for the transportation of like com-

modities between two other points of less distance, without regard to the circumstances surrounding such transportation or the competitive conditions incident to the transportation, entitled plaintiff to a recovery in damages without proof as to the pecuniary loss sustained by plaintiff. At the hearing in the Supreme Court of Missouri, a like conclusion was reached, that Court saying:

> "A stipulation was filed **which settled all the facts** in accordance with the allegations of the petition."

The stipulation, however, contained nothing by way of admission that plaintiff had sustained any damage or loss in consequence of the transportation of the coal shipped by it, it being stated in the stipulation:

> "That the defendant's stations, the rates charged by the defendant, including those paid by the plaintiff, the amount of coal transported, and the distances set out in the several counts of the petition are correctly stated therein."

In the case of

Penn R. R. Co. v. International Coal Co., 230 U. S., l. c. 197,

this Court said:

> "But although this suit was brought to enforce a cause of action given by this section to any per-

son injured, it is a noticeable fact that in its pleading the plaintiff does not claim to have been damaged, and there is neither allegation nor proof that it suffered any injury. It contends, however, that this was not necessary, for the reason that, as a matter of law, it was entitled to recover as damages the same rate per ton on all of plaintiff's shipments as had been rebated any other person on any of his tonnage shipped at the same time, over the same route. And such a right of action was expressly given in Section 2 of the original **Bill to Regulate Commerce**, which as it passed the Senate May 12, 1886, did provide that the carrier 'shall be liable to all persons who have been charged a higher rate than was charged any other person or persons for the difference between such higher rate and the lowest rate charged upon like shipments during the same period; or if such lower rate was made on any time contract or understanding, the said common carrier shall be liable to pay a like rebate or drawback to all other shippers over the same route between the same points who have shipped goods during the time that such contract or understanding was in operation.'

"The fact that this provision measuring the amount of recovery by rebate was omitted from the act, as finally reported to both houses and passed, is not only significant, but so conclusive against the contention of the plaintiff that it quotes—not the report of the conference committee—but a statement made by a member of the Senate Conference Committee," etc.

And further on in the same case this Court said:

"This conclusion that the right to recover is limited to the pecuniary loss suffered and proved is demanded by the language of the statute, the construction put upon it years ago in the Parsons case, and is the view taken in the only other case we find in which this question, under the Act to Regulate Commerce, has been construed. In Knudsen v. Michigan Central R. R., 148 Fed. Rep. 968-974, it was said by the Circuit Court of Appeals for the Eighth Circuit that to 'support a recovery under this section there must be a showing of some specific pecuniary injury. A cause of action does not necessarily arise from those acts or omissions of a common carrier that may subject it to a criminal prosecution by the Government or to corrective or coercive proceedings at the instance of the Commission.' A similar principle was applied in Meeker v. Lehigh Valley R. R., 183 Fed. Rep. 548, and in Central Coal Co. v. Hartman, 111 Fed. Rep. 96, where the suit was to recover damages caused by a violation of the Anti-Trust Act.

"Another case, on facts quite like those here involved, is that of **Hoover v. Pennsylvania R. R., 156 Pa. St. 220**, where the statute, like the Commerce Act, gave the party injured a right of action for damages suffered. In violation of the state law the railroad allowed a manufacturing company a rebate of twenty cents a ton on coal shipped. In a suit for the recovery of damages the trial court charged the jury that the difference between the high and low rate was the meas-

ure of recovery. This was reversed, the Court saying (p. 244): 'The amount of injury suffered is the measure of the single damages to be allowed. But it does not at all follow that the amount of injury suffered is the difference in the rates charged. It might be, or it might not be, **but, in any event, it must be a subject of proof.** * * * It does not appear that the plaintiffs sold their coal for any less than the current market price, except when they and the other dealers were engaged in a war of prices and sold it far below the actual cost, in a struggle to capture the market.'

"In view of the express provisions of Section 8 of the Act to Regulate Commerce, it was error to refuse to charge that 'to entitle the plaintiff to recover the jury must be satisfied that it sustained some loss or injury due to the fact that the defendant was carrying at the same time, at lower rates, coal shipped by other shippers.' "

II.

Plaintiff sought a recovery on the ground that one rate was charged for the transportation of coal over defendant's line in one part of the State, and a different rate over another portion of the road, without regard to the circumstances and conditions surrounding such transportation. To allow a recovery in damages in

such a case is a taking of property without due process of law.

Central Coal & Coke Co. v. Hartman, 111 Fed. 96;
Knudsen Fruit Co. v. Railroad, 148 Fed. 974;
Hoover v. Penn. Ry. Co., 156 Pa. St. 220;
Parsons v. Railroad, 167 U. S. 447.

III.

Section 14 of Article XII of the Constitution of Missouri provides that:

> "The General Assembly shall pass laws to correct abuses and prevent **unjust discrimination** and extortion in the rates of freight and passenger tariffs on the different railroads of this state."

Section 3173, Revised Statutes of Missouri, 1909, declares all discrimination unlawful, whether the same shall be unjust or otherwise. The Legislature of a state has no power arbitrarily to declare all discrimination by railroads unjust.

Sloan v. Pacific Railroad, 61 Mo. 224;
C. & A. R. R. v. People, 67 Ill. 11;
Hutchinson on Carriers (3rd Ed.), Vol. II, Sec. 588;
Abbott v. Lendenbower, 42 Mo. 162.

That a discrimination may be just is recognized in Section 2 of the Act of Congress in declaring what shall be deemed unjust discrimination.

Commerce Commission v. Railroad, 145 U. S. 263.

It was not the purpose of the act to prohibit a just discrimination in the transportation of persons or of property.

United States v. Railroad, 127 Fed. 785.

Section 3173 of the Missouri law prohibits charging or collecting

> "any larger or greater amount as toll or compensation than is charged or collected for the transportation of similar quantities of the same class of goods, merchandise or property over a greater distance upon the same road."

And Section 3211, R. S. Missouri, 1909, authorizes the recovery of a penalty "not exceeding one thousand dollars and costs of suit, including a reasonable attorney's fee" from any railroad corporation which shall take or receive from any person any greater toll or compensation than that hereinabove enumerated.

In a recent case involving the establishing of coal rates in the State of Missouri on tariff schedules filed by this defendant carrier the Public Service Commission of the State said:

> "We shall not attempt to enter upon a discussion of the law as set forth in the McGrew cases. It is sufficient to say that Section 12 of Article XII of the Constitution of this State provides as follows:

"'It shall not be lawful in this State for any railway company to charge for freight or passengers a greater amount for the transportation of the same for a less distance than the amount charged for any greater distance, and suitable laws shall be passed by the General Assembly to enforce this provision, but excursion and commutation tickets may be issued at special rates.'

"We have taken the time to examine the constitutional debates and the reasons set forth for the adoption of the above section of our Constitution. We find that when it was up for consideration on the afternoon of the sixty-first day of the session the following explanation took place:

"'Mr. Wagner: I would call attention to this section. It says: "It shall be unlawful in this State for any railway company to charge for freight or passengers a greater amount for the transportation of the same for a less distance than the amount charged for any greater distance." It means at a greater rate, I presume, although it does not say it.

"'Mr. Priest: No, it does not mean that. I will tell you what it means. Railroads are frequently in the habit of charging more for a less distance for a car than they are for a greater distance, and the idea is that they shall not charge a greater amount for a less distance than they do for a greater distance.'"

Following the explanation by Mr. Priest, the record shows that said section was adopted.

"We think that it is too plain for argument that, under the provision of this section, **that a railroad may charge as great an amount for a less distance as they do for a greater distance.** As stated by Mr. Priest, the idea is that they shall not charge a greater amount for a less distance than they do for a greater distance. In other words, the Constitution permits a railway company **to charge as much** for hauling freight or passengers for a less distance than it does for a greater distance. For example, we think, under this provision of our Constitution, a railroad company may charge as much for hauling a carload of coal fifty miles as it charges for hauling another carload one hundred miles, but it cannot charge more for the fifty-mile haul than it does for the hundred-mile haul."

In the same case, the Missouri Public Service Commission further said:

"It has been found in actual practice that a mileage schedule of rates on coal cannot be successfully applied, but that the so-called blanket or zone system must be used. * * * Supplying a market like Kansas City—possibly one of the largest in the West—it is found that coal is produced at various distances, and generally speaking, in all directions. If the closest mine to Kansas City is located some forty miles distant and in Kansas, while another mine is located on another road some fifty-two miles distant, in Missouri, it naturally follows that the supplying of the market will be met with the coal from the closest mine, if a mileage schedule

of rates is adopted, and that it would mean that the line handling the coal from the Missouri mine would be deprived of the revenue produced by the handling of that traffic, unless it met the rate of the Kansas Company."

The strict enforcement of the provisions of Section 3173 would confiscate the property of every common carrier and drive them all from the State of Missouri; yet, at the same time, it would benefit no one. Such a law, therefore, is violative of the Fourteenth Amendment to the Constitution of the United States.

For illustration, the city of Joplin, Missouri, with thirty-five thousand inhabitants, is located within twenty miles of the coal fields of Pittsburg, Kansas, and eighty-three miles from the coal mines of Rich Hill, Missouri. The railroad company, being prohibited from charging more for a shorter than a longer haul under all conditions and circumstances, could not, under the statute quoted, give a reduced rate from Rich Hill to Joplin to compete with the coal mines of Kansas, and thirty-five thousand citizens of Joplin must be deprived of the benefit of the competition which would otherwise exist between the coal mines of Rich Hill, Missouri, and of Pittsburg, Kansas, because of the provisions of the Missouri statute.

In the dissenting opinion of Judges Woodson, Fox and Burgess of the Missouri Supreme Court, 230 Mo. (Rec., p. 105), it is said:

"When traffic is not of like kind, or when the service is not like and contemporaneous, or when the transportation is not rendered under substantially similar circumstances and conditions, difference in charges does not constitute unjust discrimination within the meaning of Section 2 of the Act (Interstate Commerce Commission v. Railroad, 43 Fed. 37). The language of the act recognizes that a uniform rate between different shippers is not always possible or proper; that the time of service, the kind of traffic, and the circumstances and conditions under which it is transported may materially change the just obligations and duties of the carrier to its patrons (United States v. Hanley, 71 Fed. 672). A carrier, subject to the act, is only bound to give the same terms to all persons alike, under the same conditions and circumstances. Any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge (Commerce Commission v. Railroad, 141 Fed. 1003-1014). In fixing rates for differing but analogous services, the carrier has the right to exercise an honest discretion. Trifling differences of cost or character of services rendered do not justify disparity of charges, but, where the differences are substantial, either in the work to be performed or in the utility and value to the persons served, a fair relation of rates meets the carrier's obligation (Carr v. Railroad, 9 I. C. C. R. 1). Discrimination to be unlawful must be unjust. All discriminations between persons are not unlawful under section 2 of the act, but only such

as are unjust (Interstate Commerce Commission v. Railroad, 43 Fed. 47). It is not all discriminations that fall within the inhibition of the act, but only such as are unjust or unreasonable (Interstate Commerce Commission v. Railroad, 145 U. S. 263).

"What constitutes unjust discrimination? In order to constitute unjust discrimination under section 2 of the act the carrier must charge or receive directly from one person a greater or less compensation than from another, or must accomplish the same thing indirectly by means of a special rate, rebate or other device, but, in either case, it must be for a 'like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions' (Interstate Commerce Commission v. Railroad, 145 U. S. 281)."

With reference to the results likely to follow from the enforcement of the provisions of the Missouri statutes, the dissenting judges in this case said (Rec., p. 100):

"Counsel for defendant, in arguing this cause, stated that, if the long and short haul of the statute as understood by counsel for plaintiff was observed, the annual loss of about six hundred thousand dollars would be entailed upon his client. While that statement is no part of the record, yet we may use it for the purpose of illustrating the question in hand, and the great loss that would be visited upon defendant, if that rule is to be

enforced; and, if capitalized at four per cent, it would be equivalent to wiping out of existence about fifteen million dollars' worth of defendant's property, and that, too, with no corresponding benefit to any one, but a positive injury to the competitive towns as before shown. And that is not all. The same proportionate loss would be entailed upon all other railroads in this State."

IV.

The enforcement of the provisions of the Missouri statute would impose an unreasonable burden upon interstate commerce.

Wabash Railroad Co. v. Ills., 118 U. S. 557;
Wilmington Transp. Co. v. Cal. R. R. Com., 236 U. S. 155.

V.

Section 3211, Revised Statutes of Missouri, is also unconstitutional and void, because the penalties authorized by it are unreasonable and oppressive.

Ex parte Young, 209 U. S. 123;
Wilcox v. Consolidated Gas Co., 157 Fed. 881;
Wilcox v. Gas Company, 212 U. S., *l. c.* 53;
Cotting v. K. C. Stock Yards Co., 183 U. S. 100;
Mo. Pac. Ry. Co. v. Tucker, 230 U. S. 340.

The statute above mentioned does not provide a recovery for any sum as damages based upon the pecuniary loss to the party aggrieved, but provides that

the railroad corporation which shall fix, demand or receive any toll or compensation in violation of the provisions of section 3173, "shall forfeit and pay for any such offense any sum not exceeding one thousand dollars and costs of suit, including a reasonable attorney's fee," etc. Said statute further provides that any officer or agent of any such railroad corporation, who shall knowingly or willfully violate the provisions of the sections contained in the article shall also be liable to the penalties above named.

In this case, therefore, defendant in error (plaintiff below) recovered as penalties the sum of $16,504.19, without proof of any pecuniary injury sustained.

The statute under consideration in the case of

Consolidated Gas Co. v. City of New York, 157 Fed. Rep., p. 852,

contained a similar provision, to-wit: That a violation of any of its provisions "shall occasion the forfeiture of the sum of one thousand dollars for each offense to the people of the State". With reference to this provision, the District Judge said:

> "I am of the opinion that the penalty clauses in both statutes are clearly obnoxious to the remarks of Brewer, Judge, in Cotting v. Kansas City Stock Yards Company, 183 U. S. 79."

And this Court, in its review of the Gas Company case, *supra*, said (212 U. S., *l. c.* 53):

> "We are of the same opinion as to the penalties

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1916

No. 222

THE MISSOURI PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR

vs.

McGREW COAL COMPANY, DEFENDANT
IN ERROR

STATEMENT AND BRIEF OF DEFENDANT IN ERROR

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THE NEWS PRINTING COMPANY

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POINTS

I

The Missouri Constitution (sec. 12, art 12) provides:

"It shall not be lawful in this state for any railroad company to charge for freight * * * a greater amount for the transportation of the same, for a less distance than the amount charged for any greater distance." (p. 6). The Supreme Court of Missouri has held this constitutional provision to be self-enforcing (59, 60) and that a shipper suing for a violation thereof was entitled to recover the amount of the excess rate charged. This is a question of general law upon which the decision of the state court is final and no federal question is presented. (Pp. 17, 20, 31, 40, 41, 42, 43, 50, 59, 60, 61.)

II

The Missouri constitutional provision, as construed by the highest court of the State does not violate the Fourteenth Amendment to the Constitution of the United States. (Pp. 12-19, 20-26, 28-40, 45-47).

Authorities cited by plaintiff in error analyzed. (Pp. 47-63).

III

The comparative rates being both based on shipments between points entirely in Missouri, no question of interstate commerce arises. (Pp. 26-28, 64-66).

IV

No question as to a penalty arises:

(a) Because no penalty was inflicted. The shipper recovered the excess rates as for an overcharge;

(b) If the recovery in the trial court be regarded as the infliction of a penalty, this Court cannot interfere unless such penalty is clearly arbitrary and oppressive. That is not the case here as the shipper only recovered the actual excess rate collected by the carrier. (Pp. 66-85);

(c) The penalty statute is clearly separable from the constitutional provision containing no penalty, held by the state court to be self-enforcing and creating a cause of action independent of the penalty statute for the excess rate charged. (Pp. 17, 20, 31, 40, 41, 42, 43, 50, 59, 60, 61).

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IN THE

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No. 222

THE MISSOURI PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR

vs.

McGREW COAL COMPANY, DEFENDANT IN ERROR

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI

Statement of the Case

The suit below was instituted by filing in the Circuit Court of Lafayette County, Missouri, a petition containing forty-seven counts, each based upon illegal and over freight charges on shipments of coal in car lots from Myrick, Missouri, to some other station on plaintiff in error's railroad in the State of Missouri, made in violation of the Missouri constitution and satute.

Omitting the formal parts of the petition we will here insert one of the forty-seven counts therein as typical of them all:

"Plaintiff avers that on April, 1908, it was and still is a coal mining company incorporated under the law of the State of Missouri.

"Plaintiff for 1st cause of action avers that on October, 1879, the defendant was and has been ever since a railroad corporation duly organized under the law of said state and a common carrier

for hire of freight and passengers between its stations hereinafter named in said state.

"That within five years last past and on the dates hereinafter named plaintiff produced and sold bituminous coal from its own mines near Myrick, one of defendants stations in said county, and that on various dates, named in exhibit No. 1 and in the cars therein described by number and initial, it shipped by defendant's road from said Myrick in the aggregate 867,000 pounds of its said coal in car load lots to the consignee named in said exhibit at Strasburg, Mo., another station on defendant's line of road.

"Plaintiff avers that for the said carriage of said coal defendant fixed, charged and demanded and received of the plaintiff 80 cents per ton, an illegal freight rate, being thirty cents per ton more than defendant was by law entitled to fix, demand, charge and receive, in this, that during all said times and dates herein named defendant had fixed, charged, demanded and received for the carriage for the same class of coal over its said line and over another part of said road from its station of Liberal, Mo., and to another of its said stations viz, Granby in said State, a distance of 77.14 miles, 50 cents per ton by the car load while the distance from said Myrick to said Strasburg was only 61.95 miles for which said rate of 80 cents per ton for said carriage was fixed, charged, demanded and received of plaintiff as aforesaid; and the same was illegal and exceeded the amount the defendant was entitled to fix, charge, demand and receive for said shipments by the sum of $130 and 5 cents.

"And the plaintiff avers that it is damaged and aggrieved by reason of said illegal freight charge in the sum of $130 and 5 cents; wherefore it prays judgment, etc. etc.

(Printed record herein pp. 12-18.)

ANSWER

The answer to each of the counts of the petition is identical, and that made to the first count only is here printed. This answer, omitting formal parts is as follows:

"Comes now the defendant and for its answer to the 1st count of plaintiff's petition, states that the same is founded upon the Session Laws of Missouri, 1872, page 69, now Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, and section 12 of Article 12 of the Constitution of Missouri, 1875, and that said sections are null and void and of no legal force and effect for the following reasons:

(a). Because said sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, when enacted by the Legislature were passed in violation of Section 32 of Article 4 of the Constitution of Missouri, 1865, in this; that the title of said Act of 1872, now Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, purports to prevent **unjust** discrimination in freight rates, whereas, the body of said Act prohibits discrimination of all kinds without regard to whether the same is unjust or just and reasonable, and the subject of said act is not therefore expressed in its title.

(b). Because said Sections 3173 and 3211 are repugnant to and in violation of Section 14 of Article 12 of the Constitution of Missouri, 1875, in this: that said section of the Constitution of Missouri provides for the passage of laws to correct abuses and prevent unjust discrimination and extortions in freight and passenger rates, and establishing reasonable maximum freight rates, whereas the body of said Act of 1872, now sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, prohibits discrimination of all kinds without regard to whether the same is unjust or just and reasonable and fixes arbitrary, unfair and unreasonable maximum rates.

(c). Because said Sections 3173 and 3211 Revised Statutes of Missouri, 1909, when re-enacted by the Legislature in 1879, were not legally re-enacted but were enacted in violation of Section 28 of Article 4 of the Constitution of Missouri, 1875, in this: that the title of said Act as passed makes the same appear to be an Act to prevent unjust discrimination, whereas, the body of said Act prohibits discrimination of all kinds without regard to whether the rates fixed are unjust or just and reasonable, and the subject of said Act is not therefore clearly expressed in its

title.

(d). Because said Sections 3173 and 3211 of the Revised Statutes of Missouri 1909, were repealed by an Act of the Legislature passed in 1887 entitled, "An Act to Regulate Railroad Corporations," passed at the extra session of 1887, same being found in the Session Laws of 1887 at page 15, now Sections 3185 and 3193 of the Revised Statutes, 1909.

For further answer to said count, the defendant says that Section 12 of Article 12 of the Constitution of Missouri, 1875, and Sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Missouri, 1909, are in violation of Section 1 of Article 14 of the Amendments to the Constitution of the United States in this: that said Sections of the Constitution of Missouri and of the Revised Statutes of Missouri, deprive defendant of its property without due process of law and denies to it the equal protection of the laws.

"For further answer to said count, the defendant says that Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, are repugnant to and in violation of Article 5 of the Amendments to the Constitution of the United States in this: That said Sections deprive the defendant of its property without due process of law.

"For further answer to said count the defendant says that Sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Missouri, 1909, and Section 12 of Article 12 of the Constitution of Missouri, 1875, are in conflict with Section 8 of Article 1 of the Constitution of the United States and the various laws passed by Congress thereunder in this: That the said defendant is engaged in interstate commerce and owns and operates various lines of railroad as a part of its system which run into other states than Missouri and into the states of Kansas, Colorado, Nebraska, Oklahoma, Illinois, Arkansas and Louisiana, and that the trains in which the plaintiff's property described in said count was being transported were at the time engaged in interstate commerce and contained car load lots and shipments of merchandise consigned and being carried from points without the

State of Missouri to points within this state, and from points within this state to points without the same and from points without this state across the state of Missouri and to points in other states, and that by reason of the premises this state is without jurisdiction to adopt and pass the sections herein named and to enforce the provisions of the same against this defendant while so engaged in interstate commerce.

"For further answer to said count, the defendant says that Sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Missouri, 1909, and Section 12 of Article 12 of the Constitution of Missouri, 1875, are in conflict with Section 8 of Article 1 of the Constitution of the United States and the various laws passed by Congress thereunder in this: that the defendant's railroad is an interstate road and its lines extend over and through the states of Missouri, Kansas, Colorado, Nebraska, Illinois, Oklahoma, Arkansas and Louisiana, and that it is engaged in interstate commerce over its said lines through all of said states and operates trains over the same in transporting freight and passengers through said States; that said section of the Constitution of Missouri and Sections of the Revised Statutes seek to compel the defendant arbitrarily to fix its rates in this State and in all of said States and in comparison with rates existing in all such States without regard to the laws passed by Congress regulating interstate commerce.

"Further answer to said count the defendant denies each and every allegation therein contained.

"Wherefore having fully answered defendant prays to go hence with its costs."

(Printed record herein pp 29-30.)

In said Circuit Court defendant in error herein moved to strike out said answer, except said general denial, on the following grounds.

First: Said parts of said answer and the alleged defenses therein set forth are based upon an erroneous construction of said provisions of the State and Federal Constitutions, and upon an

erroneous construction of the statutory provisions referred to in said answer.

Second: Said parts of said answer and defenses, as pleaded, allege erroneous conclusions drawn from said Constitutional and statutory provisions referred to therein.

Third: They state no facts constituting any defense to the causes of action contained in the petition.

Fourth: They are improperly pleaded in the answer and can only be urged by demurrer to the petition.

To the action of the court in striking out said parts of said answer the plaintiff in error duly excepted and saved its exceptions.

(Printed record herein p. 23.)

The following are and were the provisions of constitutional and statute law in force at all the times and dates named in the pleadings herein upon which said action is based:

MISSOURI CONSTITUTION

Article XII, Entitled "Corporations:"

"Sec. 5—The exercise of the police power of the state shall "never be abridged, or so construed as to permit corporations to "conduct their business in such manner as to infringe the equal "rights of individual, or the general well-being of the state."

"Section 12.—Discrimination prohibited—commutation tick- "ets. It shall not be lawful in this state for any railroad company "to charge for freight or passengers a greater amount for the "transportation of the same, for a less distance than the amount "charged for any greater distance; and suitable laws shall be "passed by the General Assembly to enforce this provision; but "excursion and commutation tickets may be issued at special "rates."

The statute involved here was passed in 1872, the title and two pertinent sections of said statute are hereinafter set forth:

TITLE OF ACT OF 1872

The title of the act of 1872 is as follows: "An act to prevent unjust discrimination and extortion in the rates to be charged by the different railroads in this state for the transportation of freight on said roads."

"Section 1.—No railroad corporation organized or doing "business in this state, under any act of incorporation or general "law of this state, now in force or which may be hereafter "enacted, shall directly or indirectly charge or collect, for the "transportation of goods, merchandise or property on its said "road for any distance any larger or greater amount, as toll or "compensation, than is charged or collected for the transportation "of similar quantities of the same class of goods, merchandise or "property over a greater distance upon the same road, nor shall "such corporation charge different rates for receiving, handling "or delivering freight at different points on its road or roads "connected therewith, which it has a right to use, nor shall any "such railroad corporation charge or collect, for the transporta-"tion of goods, merchandise or property over any portion of its "road, a greater amount as toll or compensation than shall be "charged or collected by it for the transportation of similar quan-"tities of the same class of goods, merchandise or property over "any other portion of its road of equal distance; and all such "rules, regulations or by-laws of any railroad corporation, as "fix, prescribe or establish any greater toll or compensation than "is hereinbefore prescribed, are hereby declared to be void." (Act 1872.) (R. S. 1879 § 820; R. S. 1889 § 2629; R. S. 1899 § 1126; R. S. 1909 § 3173).

Section 4 of said Act of 1872 is as follows:

> Section 4.—Any railroad corporation which shall fix, demand, take, or receive, from any person or persons, any greater toll or compensation for the transportation, receipt, handling or delivery of goods or merchandise, in violation of the provisions of this act, shall forfeit and pay **for any such offense any sum not exceeding one thousand dollars and costs of suit,** * * * to

be recovered by civil action by the party aggrieved. &c. &c.

(The above sections of the Act of 1872 were carried throug all of said revisions and are now § 3211 R. S. 1909 and § 3173 R S. 1909.

STIPULATION OF FACTS

The only evidence offered in the case was the following stip ulation of facts:

"It is hereby stipulated between the parties that the de fendant's stations, the rates charged by the defendant, includin those paid by the plaintiff, the amount of coal transported and th distances set out in the several counts of the petition are correc ly stated therein.

"It is further stipulated that such coal was delivered b plaintiff to the defendant for shipment in the usual and ordinar way without any direction or request by plaintiff a to what particular trains the same was to be transported in an that the defendant received and transported the same in th usual and ordinary course of business, on the usual trains passin over its roads. It is further agreed that the trains in which th defendant hauled said cars of coal contained other cars and shi ments consigned from points within this state to points witho the same, from points without the same to points within th state and from points without this state through this state an to points in other states."

"L. L. SCOTT,

"H. C. CLARK,

"Attorneys for Defendant.

ALEXANDER GRAVES,

Attorney for Plaintiff.

(Printed record herein p. 20.)

Judgment was rendered in said court in favor of plaintiff each of said counts in the petition for the amount there claimed aggregating $16,504.19.

(Printed record herein pp. 6-11.)

After ineffective motion for a new trial, plaintiff in error appealed from said judgment to the Supreme Court of Missouri, and upon affirmance thereof by said court the plaintiff in error took this writ of error to said judgment of said Supreme Court.

The opinion of the Supreme Court of Missouri, on affirmance, is as follows:

In the Supreme Court of Missouri, in Banc, April Term, 1915.

No. 17317.

McGrew Coal Company, Respondent,

vs.

Missouri Pacific Railway Company, Appellant.

"This is an action brought in the Lafayette County Circuit Court, under sections 3173 and 3211, R. S. 1909, **to recover freight overcharges.** From a judgment for Plaintiff, defendant appealed. Each count of the petition is in legal effect identical with the counts of the petition in McGrew vs. Railroad, 258 Mo., 23, and with those in the cases between the same parties cited in the opinion in that case, Ibid, l. c. 25, differing only in amounts, dates and destination of shipments and in distances used for purposes of comparison.

"The trial court struck out all of the answer except the general denial, and the exception to that ruling has been preserved for review. A stipulation was filed which settled all the facts in accordance with the allegations of the petition. There was no waiver of the penalty as in the case in the 258th Mo., but the finding of the court upon each count was confined to the amount of the **overcharge alleged.** The aggregate of the findings and judgments on the several counts was $16,504.19.

"The appeal in this case was taken in 1912, more than a year and a half prior to the decision of this court in McGrew vs Railroad, 258 Mo., 23. The assignments of error in this case, in legal effect, and the points and authorities, verbatim, are identical with those in that case. The authorities cited are exactly the same. No argument is advanced in this which was not advanced in that. That decision was rendered by Court in Banc, six judges

concurring and one not sitting. The opinion in that case contains an epitome of the history of the litigation between James C. McGrew and appellant. It need not be repeated here. The questions presented have all been considered heretofore with great care and at great length and consistently have been decided against appellant. Upon the authority of McGrew vs. Railroad, 258 Mo., 23, and the cases cited therein, this judgment is affirmed. All concur, except Graves, J., not sitting."

JAMES T. BLAIR, J.

(Printed record herein p. 43.)

BRIEF

I.

The following are and were the provisions of constitutional and statute law in force at all times and dates named in the pleadings herein upon which said action is based:

MISSOURI CONSTITUTION

Article XII, Entitled "Corporations:"

"Sec. 5. The exercise of the police power of the state shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well-being of the state."

"Sec. 12. Discrimination prohibited—commutation tickets. It shall not be lawful in this state for any railroad company to charge for freight or passengers a greater amount for the transportation of the same, for a less distance than the amount charged for any greater distance." * *

The statute involved here was passed in 1872, the title and two pertinent sections of said statute are hereinafter set forth:

TITLE OF ACT OF 1872

The title of the act of 1872 is as follows: "An act to prevent unjust discrimination and extortion in the rates to be charged

by the different railroads in this state for the transportation of freight on said roads."

"Section 1. No railroad corporation organized or doing business in this state, under any act of incorporation or general law of this state, now in force or which may be hereafter enacted, shall directly or indirectly charge or collect, for the transportation of goods, merchandise or property on its said road for any distance any larger or greater amount, as toll or compensation, than is charged or collected for the transportation of similar quantities of the same class of goods, merchandise or property over a greater distance upon the same road, * * and all such rules, regulations or by-laws of any railroad corporation, as fix, prescribe or establish any greater toll or compensation than is hereinbefore prescribed, are hereby declared to be void." (Act 1872.) (R. S. 1879, §820; R. S. 1889, §2629; R. S. 1899, §1126; R. S. 1909, §3173).

Section 4 of said Act of 1872 is as follows:

Section 4. Any railroad corporation which shall fix, demand, take, or receive, from any person or persons, any greater toll or compensation for the transportation, receipt, handling or delivery of goods or merchandise, in violation of the provisions of this Act, shall forfeit and pay for any such offense any sum not exceeding one thousand dollars and costs of suit, * * * to be recovered by civil action by the party aggrieved, etc. etc.

(The above sections of the Act of 1872 were carried through all of said revisions and are now, §3211 R. S. 1909 and § 3173 R. S. 1909.)

STIPULATION OF FACTS

The only evidence offered in the case was the following stipulation of facts:

"It is hereby stipulated between the parties that the defendant's stations, the rates charged by the defendant, including those paid by the plaintiff, the amount of coal transported and the distances set out in the several counts of the petition are correctly stated therein.

"It is further stipulated that such coal was delivered by plaintiff to the defendant for shipment in the usual and ordinary way without any direction or request by plaintiff as to what particular trains the same was to be transported in and that the defendant received and transported the same in the usual and ordinary course of business, on the usual trains passing over its roads. It is further agreed that the trains in which the defendant hauled said cars of coal contained other cars and shipments consigned from points within this state to points without the same, from points without the same to points within this state and from points without this state through this state and to points in other states."

STATEMENT OF CASE, Ante p. 8.

II.

The case of Penn. R. R. Co. vs. International Coal Co. 230 U. S. l. c. 197, is cited and quoted from by plaintiff in error herein, but that case was wholly based upon the Federal Statute to regulate interstate commerce, whereas this action is based solely upon a legislative act and the constitution of the State of Missouri expressly giving the defendant in error the right to sue for the breach of this legislative act of the State of Missouri. The Supreme Court of the state has very often construed this state law and has invariably sustained the view that the defendant in error was entitled to sue under said constitution, and legislative act for the excess of charges made by the carrier for transporting freight of the same class over a shorter than over a longer distance.

McGrew vs. Mo. Pac. Ry. Co. 177 Mo. l. c. 537, for copy of petition in that case, identical with the present, dates and amounts being different, and 545 at bottom for decision holding the petition stated a good cause of action.

McGrew vs. Mo. Pac. Ry. Co. 230 Mo. 496 and 546 expressly reaffirming McGrew vs. Mo. Pac. Ry. Co. 177 Mo. 537 **supra.**

McGrew vs. Mo. Pac. Ry. Co. 258 Mo. 23, especially page l.

c. 25, where the Missouri Supreme Court said: "A petition **of which the present is a copy except as to dates and amounts of shipments,** was before this court for review upon an appeal by the present plaintiff from the judgment sustaining a demurrer of the present defendant in a similar action. (McGrew vs. Railroad, 177 Mo. 533.) The theory upon which the lower court dismissed the petition in that case was that the same section of the statute now before this court had been repealed by the Act of 1887. Judge Gantt, speaking for this court, held that the trial court had misconceived the law, and that the section of the statute on which that case was bottomed (same as the one on which this petition is founded), was not impliedly repealed by the latter act of 1887, **and that the petition in that case stated a good cause for action.**

"This decision, and its ruling as to the sufficiency of a petition framed under this statute to state a cause of action, was approved and repeated in Cohn vs. Railroad, 181 Mo. l. c. 45, and it was followed in the same case which reached the Kansas City Court of Appeals on a retrial after a remand by this court. (McGrew vs. Railroad, 118 Mo. App. 379.)"

Compare the petition in this case (pp. 1 and 2 Ante) with the petition in McGrew vs. Railroad, 177 Mo. pp. 537 and 538 to prove that they are identical, dates and amounts only being different. Hence, the Missouri Supreme Court was correct when it held in this case appealed from "A stipulation was filed which settled all the facts in accordance with the allegations of the petition."

This stipulation, which takes the place of proof, when compared with the petition herein, furnishes the most complete evidence of the allegation of damages acording to the construction placed on it in the several Missouri decisions above referred to, including the case at bar appealed from. (See this case in the statement Ante 9 and 10.) Hence the allegata and probata agree.

In McGrew vs. Railroad 258 Mo. 23, above cited by Judge Blair, the opinion is as follows:

Bond J. (after stating the facts).

Appellant claimed in its amended answer which was stricken out by the trial court, whose ruling it assigned for error:

First: That sections 3173 and 3211 of the Revision of 1909, which were enacted in 1872 and brought forward in all the subsequent revisions and are now found without change in our present statute, were in contravention of the State Constitutions of 1865 and 1875, and the Federal Constitution;

Second: That said acts were repealed in 1887 at an extra session of the Legislature;

Third: That section 12, article 12, of the Constitution of Missouri of 1875 is in violation of section 1, article 14, of the Amendments to the Constitution of the United States. If there is any merit in these contentions they are still open to review, for when they were stricken out of its answer, appellant preserved an exception and stood upon its answer without pleading further, and by its appeal has invoked the ruling of this court upon thsee questions. This, however, is not the first time that duty has been imposed upon this court by appellant. A petition of which the present is a copy except as to dates and amounts of shipments, was before this court for review upon an appeal by the present plaintiff from the judgment sustaining a demurrer of the present defendant in a similar action. (McGrew vs. Railroad 177 Mo. 533.) The theory upon which the lower court dismissed the petition in that case was that the same section of the statute now before this Court had been repealed by the act of 1887. Judge Gantt, speaking for this court, held that the trial court had misconceived the law, and that the section if the statute upon which that case was bottomed (same as the one on which this petition is founded), was not impliedly repealed by the latter act of 1887, and that the petition in that case stated a good cause of action.

This decision and its ruling as to the sufficiency of a petition framed under this statute to state a cause of action, was approved and repeated in Cohn vs. Railroad 181 Mo. L. C. 45, and

it was followed in the same case which reached the Kansas City Court of Appeals on a retrial after a remand by this Court. (McGrew vs. Railroad 118 Mo. App. 379.)

But these litigants finally had the ear of this Court In Banc. McGrew vs. Railroad 230 Mo. 496.) In that decision an eminent lawyer was called to assist this court as a special judge. His performance of that duty is an example of learning, logic and thorough investigation. The conclusions there announced covered every point of attack then made and now made, as to the statutes or constitutional provisions which gave rise to the present case. The discussion is clear and convincing to a demonstration and leaves nothing further to be said on the subject unless we shall paraphrase or republish his language. If we did the former, we should hazard the loss of the syllogistic force and clarity of the original; if we did the latter, we should only swell our reports by publishing for a second time what is already contained in them. That decision contains rulings in a connected and complete form and seriatin upon every question which is presented on the present appeal. With the decision in that case we are content.

We fully concur in its doctrines, and for the reasons there given, the present judgment is affirmed. All concur except Graves J. not sitting.

McGrew vs. Railroad, 258 Mo. 24-26. (printed record herein, 47-48.)

In this connection, we think it proper to refer to the decisions of this court in construing a Colorado statute:

Union Pacific R. Co. vs. Goodridge, 149 U. S. 680, was an action at law by the firm of Goodridge & Marfell, coal merchants, carrying on the business of mining coal at Erie, Colorado, and of selling the same at Denver, Colorado, against the Union Pacific Railway Company, to recover damages, under a statute of Colorado, for an alleged unjust discrimination in freights upon coal from Erie to Denver. The Constitution and statute of Colorado upon which the action was based are as follows:

Constitution, Art. XV. Sec. 6. "All individuals, associations and corporations shall have equal rights to have persons and property transported over any railroad in this state, and no undue or unreasonable discrimination shall be made in charges or in facilities for transportation of freight or passengers within this state, and no railroad company, nor any lessee, manager, or employee, thereof, shall give any preference to individuals, associations, or corporation in furnishing cars or motive power."

"Session Laws of Colorado, 1885, page 309: Sec. 7. (Unjust discrimination.) No railroad corporation shall, without the written approval of said commissioner charge, demand, or receive from any person, company or corporation for the transportation of persons or property, or for any other service, a greater sum than it shall, while operating under the classification and schedule then in force, demand or receive from any other person, company or corporation for a like service from the same place, or upon like conditions and under similar circumstances, and all concessions of rates, drawbacks, and contracts for special rates shall be open to, and allowed all persons, companies and corporations alike, at the same rate per ton per mile, upon like conditions and under similar circumstances, except in special cases designed to promote the development of the resources of this state, when the approval of said commissioner shall be obtained in writing," etc.

"Section 9. (Penalty.) Any railroad corporation that shall violate any of the provisions of this Act as to loading points, freight cars, unjust discrimination or extortion **shall forfeit, in every such case, to the person, company or corporation aggrieved thereby,** three times the actual damages sustained or overcharges paid by the party aggrieved, which triple damages shall be adjudged to be paid, together with the costs of suit and a reasonable attorneys fee, to be fixed by the court, and taxed with the costs." **idem.** 680.

This Court in affirming the judgment below said as follows:

"The seventh and last assignment of error was to the action

of the court in refusing to grant a new trial, and in entering a judgment on the verdict, because there was no sufficient evidence to support the verdict and especially to sustain it as to the amount of damages. Plaintiff's evidence had shown that the Marshall company had been receiving a rebate upon all coal transported by it to Denver, which was not allowed to its competitors in business, and the damages sustained by the plaintiffs were measured by the amount of such rebate, which should have been allowed to them. The question whether they lost profits upon the sale of their coal by reason of the non-allowance of such rebates was too remote to be made an element of their damages. **They were entitled to the same terms which the Marshall Company would have received, and DAMAGES to the exact extent to which the Marshall Company was given a preference.** There was no error in the action of the Court below, and its judgment is, therefore, affirmed." idem. 697.

Pennsylvania R. Co. vs. International Coal Min. Co. 230 U. S. 201, is cited and relied upon by plaintiff in error; but it is based on the act of Congress to regulate commerce among the States which is essentially different from the Colorado statute and the Missouri statute and Constitution upon which this action is based and which has been construed very often by the Missouri Supreme Court sustaining the measure of damages adopted therein. This case, moreover, discusses and approves Union Pacific R. Co. vs. Goodridge, supra, instead of over-ruling it.

See Pennsylvania R. Co. vs. International Coal Min. Co. 230 U. S. 201, 202.

III.

In the further discussion of this case, it is necessary again to refer to and quote from the decision of the Supreme Court of Missouri in McGrew vs. Railroad, 177 Mo. 537, which is the first case decided on the constitution and law involved herein between the parties to this suit, and continually re-affirmed by the Supreme Court of Missouri. The decision in that case quotes

the petition literally 537 and 538 **idem**: "To this petition defendant demurred on the ground that neither of the counts stated a cause of action, and the court sustained the demurrer, and plaintiff declining to amend, judgment was rendered for defendant and plaintiff appealed to this court."

McGrew vs. Railroad 177 Mo. **idem.** 539, and proceeds to quote the Missouri statute and constitution, same as in Statement of Case, ante 6, 7, 8, and further proceeds, on page 543 as follows:

"The first, or section 1126, Revised Statutes 1899, had and has for its object the regulation of freight charges **in any** direction, the same or opposite directions, on the same road and over **any portion** of the same road, regardless of 'circumstances or conditions', and is in the language of the constitutional itself, article 12, section 12, supra, whereas section 1134, Revised Statutes 1899, by its terms is limited to shipments over that part of the railroad **'in the same direction,** under similar circumstances and conditions' and both can readily stand together. (State ex rel. vs. County Court, 41 Mo. 53; State ex rel vs. Draper, 47 Mo. 29.)" **idem.** p. 543.

And the court further proceeds on pp. 544, 545, **idem**:

"As section 1134 in no manner attempted to regulate charges in **opposite directions,** and as section 1126 did provide for shipments in opposite as well as in the same direction, it is obvious that section 1134 did not intend or attempt to repeal the law provided for a state of case to which it had no reference whatever, and hence is not repugnant to the provisions of the former act.

"That the people in their organic law and the legislature, had plenary power to thus legislate for the control of common carriers like railroads, is too plain for discussion, and being a legislative function, it is not for the courts to thwart the action of the General Assembly. If any reason were necessary to support this enactment of the Legislature to prevent a common carrier from discriminating against one locality or shipper in

the interest of a rival locality or person, the purpose of the framers of the Constitution, and of the people in adopting it, and the Legislature in carrying into effect this provision in section 12 of article 12, as it did by the passage of section 1126, was clearly to require the railroads of the State to serve all shippers on the same terms and to prevent unjust discrimination. Such a statute will be construed in the most beneficial way 'which its language will permit, to favor public convenience and to avoid all prejudice to public interests.' (Sutherland on Stat. Con., sec. 324.)

"Section 5 of article 12 of our Constitution ordains that the police power shall never be 'so construed as to permit corporations to conduct their business in such manner as to infringe **the equal rights of individuals.**'

"There is no reason why a shipper on the same railroad shall be required to pay greater compensation or larger tolls on the same class of freight or property going in one direction than that paid by other shippers on like freight in an opposite direction for the same distance, and the Constitution, and section 1126 passed in obedience to it, clearly prohibits that he should.

"Without further elaboration, we are of opinion that the passage of section 1134, Revised Statutes 1899, did not repeal section 1126, Revise Statutes 1899, by implication, and that the latter section is still in force and was operative when the alleged shipments were made, and the petition, therefore, stated a good cause of action, and the demurrer was erroneously sustained.

"The judgment of the Circuit Court is reversed and the cause remanded for trial. Burgess and Fox, JJ., concur." **idem.** pp. 544, 545.

The above decision has been constantly reaffirmed and approved by the Missouri Supreme Court as follows: McGrew vs. Mo. Pac. Ry. Co. 230 Mo. 496 (Rec., 47 et seq.); McGrew vs. Mo. Pac. Ry. Co. 258 Mo. 23 (printed record herein pp. 47, 48); McGrew vs. Mo. Pac. Ry. Co. (printed record herein p. 43); Cohn vs. Railroad 181 Mo. 45, (last paragraph.)

IV.

The foregoing decisions last above cited on questions of state law are binding upon this Court; it being the peculiar province and privilege of the state courts to construe their own statutes even though this Court may doubt the correctness of the State Supreme Court decision.

Louisville & N. R. Co. vs. Kentucky 183 U. S. l. c. 507, 508.
Wabash etc. Railway Co. vs. Illinois 118 U. S. l. c. 564, 565.
Commercial Bank vs. Buckingham's Exec. 5 How. 343.
Alabama & V. R. Co. vs. Railroad Com. 203 U. S. l. c. 496.

V.

The case next cited is so exactly applicable and settles so many points involved in the case at bar that we beg leave to quote extensively therefrom.

In Louisville & Nashville Railroad vs. Kentucky 183 U. S. 504, a writ of error was issued to the Court of Appeals of Kentucky, affirming a judgment of Marion County, Kentucky, sentencing the Louisville & Nashville Railroad Company to a fine of $300.00 for violation of a statute of Kentucky prohibiting any person or corporation owning a railroad in the state to charge any greater compensation for the transportation of passengers or property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance, over the same line in the same direction. The title of the Kentucky act was "An act to prevent railroad companies or corporations owning and operating a line or lines of railroad, and its officers, agents, and employees from charging, collecting or receiving extortionate freight or passenger rates in this commonwealth," etc.

"But certain facts which were alleged to show that the circumstances and conditions under which the charges in question were made and received were not substantially similar with those ordinarily obtaining, and thus to show that the charges objected to were just and reasonable, were offered in evidence by the

railroad company, and excluded from the jury by the trial court, which gave to the jury what amounted, in legal effect, to a peremptory instruction to find the defendant company guilty as indicated. The jury accordingly returned a verdict of guilty, fixing the fine at $300.00, for which judgment was rendered, and an appeal was taken by the defendant company from that judgment to the court of appeals. It was contended in the courts below and here that as §218 of the Constitution of the State of Kentucky, regulating charges for transportation over different distances, is in terms a copy of the provision on the same subject in the Interstate Commerce Act, it should be assumed that it was the intention of the constitutional convention of Kentucky to adopt the construction put upon that provision in the interstate commerce law by the Federal courts; and that as those courts had held that the existence of actual competition of controlling force in respect to traffic important in amount might make out a dissimilarity of circumstances and conditions entitling the carrier to charge less for the longer than for the shorter haul, without any necessity to first apply to the commission for authority so to do, that construction should have been followed at the present trial, where evidence was offered tending to show the existence of competition of that character, caused by river transportation of coal from points outside of the state.

"Such contention might seem reasonably to have been urged in the state courts, but, as they have seen fit to disregard it, and to put a different construction upon the language employed, this court must accept the meaning of the state enactments to be that found in them by the state courts." pp. 507, 508, **idem.**

"With the meaning thus attributed to §218 of the Constitution, it is strenuously contended on behalf of the plaintiff in error "that said section has no reasonable relation to securing for the public reasonable rates or the prevention of extortion or undercharges, or the promotion of the safety, health, convenience, or proper protection to the public; but that it amounts to an arbitrary and wholly unreasonable interference with perfectly legit-

imate business, and is therefore in conflict with the 14th Amendment of the Constitution of the United States."

"To sustain these contentions the learned counsel for the plaintiff in error cite and rely upon those decisions of this court in which it has been held that, under pretense of regulating fares and freights, a state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation or without due process of law; that the question of the reasonableness of the rate of charge for the transportation by a railroad company, involving as it does the reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination; and that if the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and that in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws. Railroad Commission cases 116 U. S. 345, sub. nom. Stone vs. Farmers Loan & T. Co. 29 L. ed. 649, 6 Sup. Ct. Rep. 334, 388, 1191; Chicago M. & St. P. R. Co. vs. Minnesota 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Reagan vs. Farmers Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Smyth vs. Ames 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Lake Shore & M. S. R. Co. vs. Smith 173 U. S. 684, 43 L. ed. 828, 19 Sup. Ct. Rep. 565.

"We certainly have no disposition to over rule or disregard cases so recently decided and so elaborately considered. And, accordingly, if it appeared, in the present case, that the railroad commission had arbitrarily fixed rates of fare and freight, in

respect to which the railroad company was given no opportunity to be heard, and which were confiscatory, and amounted to depriving the plaintiff in error of its property without due process of law, it would doubtless be our duty to furnish the relief asked for. Nor yet are we ready to carry the doctrine of cited cases beyond the limits therein established. For the Federal Courts to interfere with the legislative department of the state government when acting within the scope of its admitted powers is always the exercise of a delicate power,—one that should not be resorted to unless the reason for doing so is clear and unmistakable." **idem.** 510, 511. (Many of the foregoing cases are cited and relied on by the plaintiff in error herein.)

This Court further said in Louisville & Nashville Railroad Company vs. Kentucky, **supra**:

"It does not call for argument that railroad companies are incorporated to perform a public service, and that it is for the State to define their powers and to control their exercise of such powers. The question for us, in the present case, is whether the State, by enacting a rule of action for such companies, forbidding a greater rate of charges for a shorter than for a longer distance, and by establishing a railroad commission of the kind and with the functions disclosed in the Constitution and statutes, deprives the plaintiff in error of its property without due process of law, and denies to it the equal protection of the laws. When the citizens of Kentucky voluntarily seek and obtain a grant from the State of a charter to build and maintain a public highway in the form of a railroad, it would seem to be evident that it takes, holds and operates its road subject to the constitutional inhibition we are considering, and are without power to challenge its validity." **idem.** 512, 513.

"Nor is there any foundation for the objection that the provision in question denies to the plaintiff in error the equal protection of the law. The evil sought to be prevented was the use of public highways in such a manner as to prefer, by difference of rates, one locality to another; and the remedy adopted

by the state was to declare such preferences illegal, and to prohibit any person, corporation, or common carrier from resorting to them. That remedy included in its scope every one, without distinction, whose calling, public in its character, gave an opportunity to do the mischief which the state desired to prevent. The practical inefficiency of this remedy to reach the desired end, and the resulting injury to the welfare of both the producers and the consumers of an article like coal, when brought into competition with coal brought from without the state, are strongly urged on behalf of the plaintiff in error; but however well founded such objections may be, they go to the wisdom and policy of the enactment, not to its validity in a Federal point of view. The people of Kentucky if it can be shown that their laws are defective in their conception or operation, have the remedy in their own hands." **idem.** 513, 514.

"The final contention, that §218 of the Constitution of Kentucky operates as an interference with interstate commerce, and is therefore void, need not detain us long. It is plain that the provision in question does not in terms embrace the case of interstate traffic. It is restricted in its regulation to those who own or operate a railroad within the state, and the long and short distances mentioned are evidently distances upon the railroad line within the state. The particular case before us is one involving only the transportation of coal from one point in the state of Kentucky to another by a corporation of the state. It may be that the enforcement of the state regulation forbidding discrimination in rates in the case of articles of a like kind carried for different distances over the same line may somewhat affect commerce generally; but we have frequently held that such a result is too remote and indirect to be regarded as an interference with interstate commerce; that the interference with the commercial power of the general government, to be unlawful, must be direct, and not merely incidental effect of enforcing the police powers of a state. New York S. E. & W. R. Co. vs. Pennsylvania 158 U. S. 431, 439, 39 L. ed. 1043, 1045, 15 Sup. Ct.

Rep. 896; Henderson Bridge Co. vs. Kentucky 166 U. S. 150, 41 L. ed. 953, 17 Sup. Ct. Rep. 532.

"A discussion of this subject will be found in the opinion of this court in Louisville & N. R. Co. vs. Kentucky 161 U. S. 701, 40 L. ed. 859, 16 Sup. Ct. Rep. 714, where the same conclusion was reached. The judgment of the Court of Appeals is affirmed." **idem.** 518, 519.

In the Intermountain Rate Cases, 234 U. S. 476 the carriers filed a petition in this Court requesting that the above case of Louisville & Nashville Railroad Company vs. Kentucky be reconsidered and overruled. The request was refused on the ground, among others, that the case was correctly decided.

Intermountain Rate Cases 234 U. S. 476.

VI.

Plaintiff in error being a Missouri corporation is estopped from complaining that the statute upon which this case is based controverts the constitution of the United States.

Directly on this point we quote from Louisville & Nashville Railroad vs. Kentucky **supra.** pp. 512, 513, 514:

"It does not call for argument that railroad companies are incorporated to perform a public service, and that it is for the State to define their powers and to control their exercise of such powers. The question for us, in the present case, is whether the State, by enacting a rule of action for such companies, forbidding a greater rate of charges for a shorter than for a longer distance, and by establishing a railroad commission of the kind and with the functions disclosed in the Constitution and statutes, deprives the plaintiff in error of its property without due process of law, and denies to it the equal protection of the laws.

"When the citizens of Kentucky voluntarily seek and obtain a grant from the state of a charter to build and maintain a public

highway in the form of a railroad, it would seem to be evident that it takes, holds and operates its road subject to the constitutional inhibition we are considering, and are without power to challenge its validity. Nor is there any foundation for the objection that the provision in question denies to the plaintiff in error the equal protection of the laws. The evil sought to be prevented was the use of public highways in such a manner as to prefer, by difference of rates, one locality to another; and the remedy adopted by the State was to declare such preferences illegal, and to prohibit any person, corporation, or common carrier from resorting to them.

"That remedy included in its scope every one, without distinction, whose calling, public in its character, gave an opportunity to do the mischief which the State desired to prevent. The practical inefficiency of this remedy to reach the desired end, and the resulting injury to the welfare of both the producers and the consumers of an article like coal, when brought into competition with coal brought from without the State, are strongly urged on behalf of the plaintiff in error; but however well founded such objections may be, they go to the wisdom and policy of the enactment, not to its validity in a Federal point of view.

"The people of Kentucky, if it can be shown that their laws are defective in their conception or operation, have the remedy in their own hands."

VII.

The statute upon which this suit is based cannot be construed to authorize interference with interstate commerce.

All the shipments of coal involved in this case as appears by the record herein, especially the pleadings as set forth in the statement of the case, originated at Myrick, one of the stations of plaintiff in error in the state of Missouri and were destined to various other stations on the same railroad in the same state;

nowhere crossing the Missouri state line in order to accomplish the transportation of a single car load. (In this connection we request the court to persue the first count of the petition set forth by the "statement of the case" ante pp. 1, 2.)

The stipulation as to facts, quoted in the statement and contained in the record contains all the evidence offered on the trial, and states: "that the defendant's stations, the rates charged by the defendant, including those paid by the plaintiff, the amount of coal transported and the distances set out in the several counts of the petition are correctly stated therein. That the trains in which the defendant hauled said cars of coal contained other cars and shipments consigned from points within this state, to points without the same, from points without the same to points within this state, and from points without this state through this state and to points in other states."

This could not have the effect to convert the traffic from local to interstate commerce. In Simpson vs. Shepard 230 U. S. 381, 382 the facts were that "in the case of each company, the movement of interstate and local traffic takes place at the same time, on the same rails, with the same employees, and largely by means of the same trains and cars." Yet the court held this not to affect interstate commerce.

The Missouri statute and constitution quoted in the statement, like the Kentucky statute and constitution, do not in terms embrace the case of interstate commerce. The pleadings in this case show that all traffic and **all the comparative rates** and points and distances are confined within the boundary line of Missouri and that that line is nowhere crossed.

Justice Hughes, in Simpson vs. Shepard 230 U. S. 428, 429, quoted with approval from Louisville & Nashville Railroad Company vs. Kentucky 183 U. S. 503: "It is plain that the provision in question does not in terms embrace the case of interstate traffic. It is restricted in its regulation to those who own or operate a railroad within the State, and the long and short dis-

tances mentioned are evidently distances upon the railroad line within the State. The particular case before us is one involving only the transportation of coal from one point in the State of Kentucky to another by a corporation of that State. It may be that the enforcement of the State regulation forbidding discrimination in rates in the case of articles of a like kind, carried for different distances over the same line, may somewhat affect commerce generally; but we have frequently held that such a result is too remote and indirect to be regarded as an interference with interstate commerce; that the interference with the commercial power of the general government to be unlawful must be direct, and not the merely incidental effect of enforcing the police power of a State."

In Wabash etc. Railway Company vs. Illinois 118 U. S. 564, 565 this Court in construing an Illinois statute, in substance identical with the Missouri statute, said: "If the Illinois statute could be construed to apply exclusively to contracts for a carriage which begins and ends within the State, disconnected from a continuous transportation through or into other states, there does not seem to be any difficulty in holding it to be valid. For instance, a contract might be made to carry goods for a certain price from Cairo to Chicago, or from Chicago to Alton. The charges for these might be within the competency of the Illinois Legislature to regulate. The reason for this is that both the charge and the actual transportation in such cases are exclusively confined to the limits of the territory of the State, and is not commerce among the States, or interstate commerce, but is exclusively commerce within the State. So far, therefore, as this class of transportation, as an element of commerce, is effected by the statute under consideration, it is not subject to the constitutional provision concerning commerce among the States."

Addenda.

The foregoing brief was prepared by Mr. Alexander Graves,

prior to the service of the brief of Plaintiff in Error in this case. Mr. Krauthoff will now address himself to the preparation of a reply to the last named brief.

In the Constitution of Missouri, adopted in 1875 and now in force in that state, it is provided in Sections 5 and 12 of Article 12 thereof (1 Revised Statutes of Missouri, 1909, pp. 132, 133, 134) as follows:

> "Sec. 5. The exercise of the police power of the state shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well-being of the state.
>
> "Sec. 12. It shall not be lawful in this state for any railroad company to charge for freight or passengers a greater amount, for the transportation of the same, for a less distance than the amount charged for any greater distance; and suitable laws shall be passed by the General Assembly to enforce this provision; but excursion and commutation tickets may be issued at special rates."

Revised Statutes of Missouri, 1909, sections 3173 and 3211, are correctly set out (ante, pp. 7, 8; Brief of Plaintiff in Error, pp. 9, 10.)

The constitutional and statutory provisions cited have undergone scrutiny at the hands of the Supreme Court of Missouri.

McGrew v. Missouri Pacific Railway Company 177 Missouri 533.

Cohn v. St. Louis, Iron Mountain & Southern Railway Company 181 Missouri 30.

McGrew v. Missouri Pacific Railway Company 230 Missouri 496.

McGrew v. Missouri Pacific Railway Company 258 Mo. 23.

McGrew Coal Co. v. Missouri Pacific Railway Company (case at bar, Record, p. 43.)

With respect to these cases, it is stated by counsel for the railway company, plaintiff in error in this Court, that in the case reported 258 Mo. 23, Judge Graves dissented. It is accurate to say that Judge Graves did not sit. (258 Mo. 26.) He had been of counsel in the trial court in the case reported in 230 Mo. 496, 508.

In the case at bar, the opinion (Rec., p. 43) is reported, McGrew Coal Co. v. Missouri Pacific Railway Company 178 South-Western Reporter 1179. The opinion was filed June 29, 1915 (Rec., p. 42) and the motion for rehearing was filed July 5, 1915, (43, 44) and overruled July 12, 1915, (46). The current number of Missouri Supreme Court reports is 269, covering a date posterior to July 12, 1915. The case at bar is not officially reported.

Under a Missouri Statute (Laws of Missouri, 1915, pp. 251, 252) the Supreme Court of Missouri is directed to select for publication, the "opinions which * * * should for the benefit of jurisprudence be officially reported and published." The case at bar was not so selected, thus indicating the law on the subject is regarded at settled in Missouri.

The most exhaustive discussion in the state court of the question now presented to this court, is found in McGrew v. Missouri Pacific Railway Company 230 Missouri 496 (Rec., pp. 48-111). It is there pointed out:

(a) That Revised Statutes of Missouri, 1909, sections 3173 and 3211, identical with Revised Statutes of Missouri, 1899, sections 1126 and 1160, were enacted as "Sections I. and IV. of an act of the Legislature, approved April 1, 1872, Laws (of Missouri) 1871, p. 69." The act was held valid, as against an objection arising under a local constitutional provision relating to the title of an act of the general assembly of Missouri (230 Mo. 496, 497, syllabi 2, 3, 511-518, Rec., pp. 50-54).

(b) That these sections, enacted in 1872, were not invalidated by the adoption of the Missouri Constitution of 1875, but thereafter remained in force. 230 Missouri 518-536 Rec. pp. 54-65.

(c) That the sections of the statute and the constitutional provision hereinbefore quoted are not in conflict with the Fourteenth Amendment to the Constitution of the United States. (230 Missouri 536-538 Rec., pp. 65, 66, citing Louisville & Nashville Railroad v. Kentucky 183 U. S. 503.)

(d) That the act of 1872 was not repealed by certain legislation enacted in Missouri in 1887. (230 Missouri 538-546 Rec. pp. 66-71).

(e) That section 12 of article 12 of the Constitution of Missouri is self-enforcing (230 Mo. 546-562, Rec., pp. 71-80.)

That opinion was by a divided court. But since then, six judges, the seventh not sitting, have twice declared the case cited (McGrew v. Missouri Pacific Railway Company, 230 Mo. 496) to be the law of Missouri.

McGrew v. Missouri Pacific Railway Company 258 Missouri 23, Rec., pp. 46-48.

Case at bar Rec. p. 43.

The court in 230 Missouri 496 consisted of

Willard P. Hall, Special Judge,
LeRoy B. Valliant,
James B. Gantt,
Henry Lamm,

who concurred in the prevailing opinion;

James D. Fox
Archelaus M. Woodson,
Gavon D. Burgess,

who dissented.

In 258 Missouri 23 Judge Valliant of the majority had been

succeeded by Judge Bond, and Judge Gantt of the majority by Judge Brown, Judges Fox and Burgess of the minority by Judges Walker and Faris, who voted with the majority, and Judge Woodson ceased to dissent. In the case at bar the opinion is by Judge Blair who succeeded Judge Lamm. So now, ten Missouri judges are aligned in favor of the shipper and against the carrier, with respect to the question raised in the case at bar.

I.

At a matter of convenience, we shall first take up the second point made by defendant below, plaintiff in error in this Court:

"The Legislature of the State has no power to declare all discriminations by railroads unjust." (Brief of Plaintiff in Error, Index I.) So far as this Court is concerned, the only restriction on state action, whether by the people of a State in their constitution, or by the Legislature, applicable to discriminations in freight rates on commerce within a State is found in the Fourteenth Amendment to the Constitution of the United States.

The facts of the case at bar are these:

McGrew Coal Company shipped from Myrick, Missouri, to Strasburg, Missouri, a distance of 61.95 miles, coal for which the Missouri Pacific Railway Company charged 80 cents a ton. At the same time, the railway company hauled coal for other shippers, from Liberal, Missouri, to Granby, Missouri, a greater distance (77.14) miles, for a less rate, 50 cents per ton. This is so alleged in the first count of the petition (Brief of Plaintiff in Error pp. 2-4) and admitted by the stipulation read in evidence. (Brief of Plaintiff in Error pp. 10, 11.)

No extenuating circumstances are pleaded in the answer. (Rec. pp. 18-20). The answer challenged the validity of Revised Statutes of Missouri, 1909, sections 3173, 3211, upon the grounds:

(a) Of a defect in the title of the original act;

(b) That the sections are in violation of Section 14 of article 12 of the Constitution of Missouri;

(c) That the sections in question originally adopted in 1872, were attempted to be re-enacted in 1879, in violation of certain provisions of the Constitution of Missouri, adopted in 1875.

(d) That the sections in question were repealed by certain legislation enacted in Missouri in 1887. (Rec. pp. 18-19.) Self-evidently, on a writ of error to a state court, none of these defences present a Federal question.

It is then pleaded, the sections in question "deprive defendant of its property without due process of law and deny to it, the equal protection of the laws." (Rec. p. 19.) (A question as to interstate commerce arises upon this answer, which is hereinafter discussed.)

The answer then denies "each and every allegation" contained in the petition. (Rec. p. 20). But the facts stated in the petition are admitted by stipulation. (Rec. p. 20.)

The abstract of the record filed in the Supreme Court of the State of Missouri, and which is the record in this Court, contains a bill of exceptions, which shows plaintiff read in evidence the stipulation (Rec., pp. 35-36). The record continues: "Mr. Clark (counsel for defense) The defendant does not desire to offer any evidence." (Rec. p. 36.)

So the bald fact remains: Defendant hauled coal for one shipper, 77.14 miles at 50 cents a ton. It charged another shipper, the plaintiff, a greater rate, 80 cents per ton, for a less distance, 61.95 miles. The plaintiff sued for and recovered in the state courts, on the first count of its petition the difference, 30 cents per ton, 15 cents per 1000 pounds, on 867,000 pounds, or $130.05. (Rec. pp. 6-23.)

No excuse is offered for this discrimination in the trial of

the case, but in this Court the claim is made, "Section 3173, Revised Statutes of Missouri, 1909, declares all discriminations unlawful whether the same be unjust or otherwise. The Legislature of the State has no power arbitrarily to declare all discriminations by railroads unjust." (Brief of Plaintiff in Error p. 20.)

As applied to the case at bar, this contention is denied in the state court (Rec. pp. 65, 66) upon the authority of

Louisville & Nashville Railroad Company v. Kentucky 183 U. S. 503.

In that case, the statute (Section 820, 183 U. S. 491) forbade the charging or receiving "any greater compensation in the aggregate for the transportation of passengers or property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance, over the same line in the same direction, the shorter being included within the longer distance." (See 183 U. S. 504.)

In the cases reported as Inter-Mountain rate cases, also reported as United States v. Atchison etc. Ry. Co. 234 U. S. 476, 34 Sup. Court Rep., 986, this Court called attention to Section 4 of the interstate commerce act, as amended by the Act of June 18, 1910, Chapter 309, 36 Statutes at Large, page 547, U. S. Compiled Statutes, Supplement 1911 page 1288.

That act distinctly provides that nothing therein contained shall be "construed as authorizing any common carrier, within the terms of this Act, to charge or receive as great a compensation for a shorter as for a longer distance."

In the case at bar, the defendant is contending for the constitutional right to charge greater compensation for a shorter than for a longer distance.

The section as amended was alleged to be repugnant to the Federal Constitution. The Court disposed of the contention:

"It is said in the argument on behalf of one of the

carriers that as in substance and effect, the duty is imposed upon the commission in a proper case to refuse an application, therefore the law is void because in such a contingency the statute would amount to an imperative enforcement of the long and short haul clause and would be repugnant to the constitution. It is conceded in the argument that it has been directly decided by this Court that a general enforcement of the long and short haul clause would not be repugnant to the constitution. (Louisville & N. R. Co. v. Kentucky 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95), but we are asked to reconsider and overrule the case, and thus correct the error which was manifested in deciding it. But we are not in the remotest degree inclined to enter into this inquiry, not only because of the reasons which were stated in the case itself, but also because of those already expounded in this opinion, and for an additional reason, which is, that the contention by necessary implication assails the numerous cases which, from the enactment of the act to regulate commerce down to the present time, have involved the adequacy of the conditions advanced by carriers for justifying their departure from the long and short haul clause. We say this because the controversies which the many cases referred to considered and decided by a necessary postulate involved an assertion of the validity of the legislative power to apply and enforce the long and short haul clause. How can it be otherwise since, if this were not the case, all the issues presented in the numerous cases would have been merely but moot, affording, therefore, no basis for judicial action, since they would have had back of them no sanction of lawful power whatever."

Missouri Pacific Railway Company is organized under the laws of Missouri. So pleaded in the petition (Rec. p. 13), not denied in the answer (Rec., p. 18), and hence, under Revised

Statutes of Missouri, 1909, section 1985, which reads: * * * * * "And where plaintiff or defendant sues or is sued as a corporation * * * it shall not be necessary to prove the fact of such incorporation * * * unless the opposite party put such fact in issue by affidavit filed with the pleadings in the case," stands admitted. "* * * looking only at the case of a company voluntarily formed to carry on business wholly within a state, we are unable to see how such company can successfully contend that it can be exempted by the courts from the operation of the constitution of the State."

Louisville & Nashville Railroad Co. v. Kentucky 183 U. S. 503, 513.

In the state court, it was ruled this Court had in the case cited, "recognized the power of a state absolutely to prohibit all and every kind of discrimination." (Rec. p. 66.)

Louisville & Nashville Railroad Company v. Kentucky 183 U. S. 503 is cited:

Louisville & Nashville Railroad Co. v. Eubank 184 U. S. 27, 33, 43;

Simpson v. Shepard (The Minnesota Rate Cases) 230 U. S. 352, 428, common carriers are "held subject to legislative control as to the amount of their charges" unless protected by contract. (230 U. S. 413, 414, 415, 416, 417, 428, 429, 430, 431, 432, 433);

Inter-Mountain Rate Cases 234 U. S. 476, 488, 489 (where this Court declined to reconsider and overrule the principal case cited).

The whole subject of state power with respect to regulation of railroad rates is exhaustively discussed in

Louisville & Nashville Railroad Company v. Siler 186 Fed 178;

Affirmed sub. nom. Louisville & Nashville Railroad Co. v. Garrett, 231 U. S. 298.

See, also, In Re Arkansas Rate Cases (Trieber, J.) 187 Fed. 290 and cas. cit.

The extent to which a State may in any manner regulate a public utility has been discussed in the following cases:

Munn v. Illinois 94 U. S. 113;

Chicago etc. R. R. Co. v. Iowa 94 U. S. 155;

Peik v. Chicago etc. Ry. Co. 94 U. S. 164;

Railroad Commission Cases 116 U. S. 307;

Wabash etc. Ry. Co. v. Illinois U. S. 557;

(In the last case, a state statute prohibited the charging, collecting or receiving "for the transportation of any passenger or freight of any description upon its railroad for any distance within the state, the same or a greater amount of toll or compensation than is at the same time charged, collected, or received for the transportation in the same direction of any passenger or like quantity of freight of the same class over a greater distance of the same road." [118 U. S. 561, 562.] "If the Illinois statute could be construed to apply exclusively to contracts for a carriage which begins and ends within the state, disconnected from a continuous transportation through or into other states, there does not seem to be any difficulty in holding it to be valid." [118 U. S. 564.]

Dow v. Beidelman 125 U. S. 680;

Chicago etc. Ry. Co. v. Minnesota 134 U. S. 418;

Chicago etc. Ry. Co. v. Wellman 143 U. S. 339;

Budd v. New York 143 U. S. 517;

Reagan v. Farmers' Loan & Trust Company 154 U. S. 362;

St. Louis & San Francisco Ry. Co. v. Gill 156 U. S. 649;

Smyth v. Ames 169 U. S. 466;

Chicago etc. Ry. Co. v. Tompkins 176 U. S. 167;

Chesapeake etc. Ry. Co. v. Kentucky 179 U. S. 388;

Minneapolis etc. R. R. Co. v. Minnesota 186 U. S. 257;

Atlantic Coast Line v. Florida 203 U. S. 256;

(In the case just cited, there was "nothing in the record from which a reasonable deduction can be made as to the cost of transportation, or the amount transported of the single article in regard to which an intrastate rate has been established and complained of, or how that rate will affect the income of the railway company." This Court declined to interfere. 203 U. S. 256.)

Alabama etc. Ry. Co. v. Mississippi Railroad Commission 203 U. S. 496;

("* * * the question we have to consider is the power of the State to enforce an equality of local rates as between all parties shipping for the same distance upon the same road. That a State has such power cannot be doubted * * * when it (a carrier) voluntarily establishes a local rate for some shippers, it cannot resist the power of the State to enforce the same rates for all." 203 U. S. 501.)

Missouri Pacific Ry. Co. v. Larabee Flour Mills Co. 211 U. S. 612. ("Whenever one engages in that business (that of common carrier) the obligation of equal service to all arises." 211 U. S. 619.)

Northern Pacific Ry. Co. v. North Dakota 216 U. S. 579;

Atlantic Coast Line R. R. Co. v. Mazursky 216 U. S. 122;

The Minnesota Rate Cases 230 U. S. 352;

Missouri Rate Cases, 230 U. S. 474 ("The acts are valid upon their face as a proper exercise of governmental authority in the establishment of reasonable rates, and each complainant in order to succeed in assailing them must show that as to it the rates are confiscatory." 230 U. S. 508, 509.)

Oregon R. R. & Nav. Co. v. Campbell 230 U. S. 525;

Louisville & Nashville R. R. Co. v. Garrett 231 U. S. 298;

Chicago, etc., Ry. Co. v. Iowa 233 U. S. 334;

Wilmington Transportation Co. v. California Railroad Commission 236 U. S. 151;

Illinois Central R. R. Co. v. Fuentes 236 U. S. 157;

Illinois Central R. R. Co. v. Mulberry Coal Co. 238 U. S. 275;

Atlantic Coast Line v. Glenn 239 U. S. 388;

Chicago etc. Ry. Co. v. State Public Utilities Commission of Illinois No. 148 decided by this Court, January 8, 1917.

"The general principles to be applied are not open to controversy. The railroad property is private property devoted to public use. As a corporation the owner is subject to the obligations of its charter. As the holder of special franchises, it is subject to the conditions upon which they were granted. Aside from specific requirements of this sort, the common carrier must discharge the obligations which inhere in the nature of its business. It must supply facilities that are reasonably adequate; it must carry upon reasonable terms; and it must serve without unjust discrimination. These duties are properly called public duties, and the State within the limits of its jurisdiction may enforce them. The State may prescribe rules to insure fair remuneration, and to prevent extortion, to secure substantial equality of treatment in like cases, and to promote safety, good order and convenience.

"But, broad as is the power of regulation, the State does not enjoy the freedom of an owner. The fact that the property is devoted to a public use on certain terms does not justify the requirement that it shall be devoted to other public purposes, or to the same use on other terms, or the imposition of restrictions that are not reasonably concerned with the proper conduct of the business according to the undertaking which the carrier has expressly or impliedly assumed. If it has held itself out as a carrier of passengers only, it cannot be compelled to carry freight. As a carrier for hire it cannot be required to carry

persons or goods gratuitously. The case would not be altered by the assertion that the public interest demanded such carriage. The public interest cannot be invoked as a justification for demands which pass the limits of reasonable protection and seek to impose upon the carrier and its property burdens that are not incident to its engagement."

Northern Pacific Railway vs. North Dakota 236 U. S. 585, 595.

"The power of the state in its control of domestic commerce * * * also includes the power to make any reasonable regulations for the conduct of the carrier's business, subject to the judicial determination of what is reasonable." Judson on Interstate Commerce (3d Ed.) Sec. 146.

Reeder on Validity of Rate Regulations Sec's 89-91, 137-140, 145, 151.

And so it comes to this:

The Constitution of Missouri provides (Article 12, Section 12): "It shall not be lawful in this state for any railroad company to charge for freight * * * a greater amount for the transportation of the same, for a less distance than the amount charged for a greater distance."

In the case at bar (Rec., p. 43) the opinion of the Supreme Court of Missouri is based on McGrew v. Railway Co. 258 Missouri 23. This last case is found in the Record (pp. 46-48) and is based on McGrew v. Railway Company 230 Missouri 496 Printed Record pp. 48 et seq.

The Supreme Court of Missouri has held the constitutional provision to be self-enforcing (Printed Record, p. 71 et seq.) and ruled that inasmuch as the constitutional provision is self-enforcing, that is to say, if it without the aid of any statutory enactment, makes it unlawful for a railroad company to charge more for a shorter haul than a longer one of the same class or property in any direction, (whether) the same or not, and under any or

all circumstances or conditions, then clearly the measure of damages for doing the unlawful thing, in the absence of any statute on the subject, is the amount of the excess charged for the shorter distance over that charged for the longer distance." (Printed Record, p. 71.)

This Court will not determine the correctness of that ruling. "* * * what is required by the law of Iowa has been determined by the Supreme Court of that State."

Chicago etc. Ry. Co. v. Iowa 233 U. S. 334, 344.

"In the present case we are not construing an act of the State of Mississippi or passing upon the powers which by it are given to the state railroad commission. Those matters are settled by the decision of the Supreme Court of the State * * *"

Alabama etc. Ry. Co. v. Mississippi Railroad Commission 203 U. S. 496, 501.

Missouri Pacific Ry. v. Larabee Flour Mills Co. 211 U. S. 612, 619:

"All questions arising under the construction and laws of the State of Kansas are settled adversely to the plaintiff in error by the decision of the Supreme Court of the State."

"It has long been settled, and in the very nature of things it must be so, that the conclusive effect, in the federal courts, of the interpretation of a state statute by the courts of the State, does not depend upon the view which the federal courts may take of the soundness of that interpretation. Christy vs. Pridgeon 4 Wall. 196, 203, 18 L. Ed. 322; Supervisors vs. United States 18 Wall. 71, 82, 21 L. Ed. 771; Louisiana vs. Pillsbury 105 U. S. 278, 294, 26 L. Ed. 1090; Fallbrook Irrigation District vs. Bradley 164 U. S. 112, 155, 17 Sup. Ct. 56, 41 L. Ed. 396; Adams Express Co. vs. Ohio 165 U. S. 194, 219, 17 Sup. Ct. 305, 41 L. Ed. 1047; Wilkes Co. vs. Coler 180 U. S. 506, 524, 21 Sup. Ct. 458, 45 L. Ed. 642; Louisville etc. Co. vs. Kentucky 183 U. S. 503, 508, 22 Sup. Ct. 95, 46 L. Ed. 298."

York vs. Washburn 129 Fed. Rep., 564, 569, 570.

II.

"In the case at bar, the obligation to refund * * * is based upon the common law rule which requires the payment of money which has been received in violation of an express statutory regulation * * * In harmony with this view is Louisville & Nashville R. R. Co. v. Walker 110 Ky. 961, 63 S. W. 20, in which the court held that a railroad company which charges more for a short haul than for a long haul, in violation of the constitutional provisions of that state, is liable to the shipper for the excess charged, 'as he whose money is taken from him illegally is to that extent damaged.' And in Louisville & Nashville Rd. Co. v. Eubank 184 U. S. 27, 22 Sup. Ct. 277, 46 L. Ed. 416, the court assumed without question the right of the plaintiff to sue for and recover the excess of payments made under like circumstances as in the case last cited from Kentucky * * * The effect of the constitutional provision (California) is to fix a measure of charge and that measure is the charge which is actually made for the longer haul. Any charge in excess of that for a shorter haul is by the amount of the excess illegal, and each violation of the provision furnishes the measure of the shipper's damage therefor."

Southern Pacific Co. v. California Adjustment Co. 237 Fed. 954, 959, 960 (Gilbert, Ross, and Hunt, JJ.)

> "When it appears that the decision below was adverse to the plaintiff in error upon two independent grounds, one of which is not a Federal question, the Supreme Court will dismiss the writ of error."
> 3 Foster Federal Practice (5th Ed.) Sec. 692 p. 2406.

The rule in this Court is:

> "* * * where the decision (of a state court) complained of (on writ of error to this court) rests on independent grounds not involving a federal question

and broad enough to maintain the judgment, the writ of error will be dismissed by this court without considering any federal question that may have been presented."

Cases cited 4 Fed. Stat. Ann. p. 486.

"and this even though the Supreme Court might think the position of the state court an unsound one. Klinger v. Missouri (1871) 13 Wall (U. S.) 263."
Ib. p. 487.

But the state court was right.

"The measure of damages for charging more than the scheduled rate is the difference between that rate and the rate actually exacted."
Barnes Int. Trans. sec. 412 citing Van Patten v. C. M. & St. P. Ry. Co. 81 Fed. 545 (an exhaustive discussion.)

"An excessive rate over the legal rate may be recovered, not as damages, but as an overcharge."
Penna. R. R. Co. v. International Coal Co. 230 U. S. 184, 201, 202.

"* * * it is now settled that even where, on the receipt of goods by a carrier, an exhorbitant charge is stated, and the same is coercively exacted either in advance or at the completion of the service, an action may be maintained to recover the overcharge" citing authorities.

Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 436.

"* * * the decisions of state courts in respect of matters of general law cannot be reviewed on the theory that the law of the land is violated unless their conclusions are absolutely free from error."

Sayward v. Denny 158 U. S. 180, 186.

On a writ of error to a state court, the decision of a fact does not present a federal question.

Hibben v. Smith 191 U. S. 310, 321.

See cases cited 4 Fed. Stat. Ann. pp. 488-490.

Fed. Stat. Ann. 2 Supp. 1912 p. 1395.

As to cases in which decisions of state courts held final, see Fed. Stat. Ann. 2 Supp. 1912 pp. 1396 et seq.

But it is contended the Constitution of Missouri, as thus interpreted by its highest court, denies defendant the equal protection of the laws and deprives defendant of its property without due process of law, all in violation of the Fourteenth Amendment to the Constitution of the United States.

> "It is elementary and needs no citation of authority to show that the due process clause of the Fourteenth Amendment does not * * * give jurisdiction to this Court to review mere errors of law alleged to have been committed by a state court in the performance of its duties within the scope of its authority concerning matters non-Federal in character."

McDonald v. Oregon etc. Nav. Co. 233 U. S. 665.
Roller v. Murray 234 U.S. 738.

> "It is no longer open to contention that the due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in state courts or regulate practice therein. All its requirements are complied with, provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice and adequate opportunity has been afforded to defend. Iowa Central Railway v. Iowa 160 U. S. 389; Wilson v. North Carolina 169 U. S. 586."

Louisville etc. Railroad Co. v. Schmidt 177 U. S. 230, 236.
Holmes v. Conway 241 U. S. 624, 631, 632.

As to the equal protection of the laws, the constitution applies to all railway companies.

As to due process of law, plaintiff in error, did not, either in its answer (Rec., 18-20) nor in its evidence (Rec., 36) tender any issue as to the reasonableness of the regulation found in the Constitution of Missouri.

"This court does not sit to pass upon moot questions; and, as has been often pointed out, it is incumbent upon one who seeks an adjudication that a state statute is repugnant to the Federal Constitution, to show that he is within the class with respect to whom it is unconstitutional, and that the alleged constitutional feature injures him, and so operates as to derive him of rights protected by the constitution."

Louisville & Nashville Railroad Co. v. Finn 235 U. S. 601, 610.

"Only those whose rights are directly affected can properly question the constitutionality of a state statute and invoke our jurisdiction in respect thereto."

Hendrick v. Maryland 235 U. S. 610, 621.

See, also:

Chicago etc. Ry. Co. v. Wellman 143 U. S. 339;
Atlantic Coast Line v. Florida 203 U. S. 256;
Missouri Rate Cases 230 U. S. 474, 508, 509.

In Orient Insurance Co. v. Daggs 172 U. S. 557 a state statute provided that "in case of total loss by fire of the property insured, the measure of damages shall be the amount for which the property is insured." (172 U. S. 564.) It was contended the insurance company was being deprived of its property in that "the statute takes away a fundamental right and precludes a judicial inquiry of liabilities on policies of fire insurance by a conclusive presumption of fact." (172 U. S. 564.)

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In the Daggs case, plaintiff pleaded a total destruction by fire of a barn insured in the sum of $800 and recovered a judgment for that amount. The answer of defendant "averred that at the time of the burning of the building in question it was not worth to exceed $100." (172 U. S. 559.) A demurrer to this answer was sustained in the trial court (172 U. S. 560) and this action was affirmed by the Supreme Court of the State and by this Court.

> "It would be idle and trite to say that no right is absolute. Sic utere tuo ut alienum non laedas is of universal and pervading obligation. It is a condition upon which all property is held. Its application to particular conditions must necessarily be within the reasonable discretion of the legislative power. When such discretion is exercised in a given case by means appropriate and which are reasonable, not oppressive or discriminatory, it is not subject to Constitutional objection. The Missouri statute comes within this rule.
>
> "The cases cited by plaintiff in error, which prima facie proof to certain acts, but not conclusive proof, do not apply. They were not of contract nor gave effect to contracts. It is one thing to attribute effect to the convention of parties entered into under the admonition of the law, and another thing to give circumstances, may be accidental, conclusive presumption and proof to establish and force a result against property or liberty."

In the Daggs case, in the face of a contention by the defendant insurance company that the property destroyed by fire was worth not to exceed $100.00, a recovery of the sum assured, $800.00, was upheld by this Court on the ground that the result reached was predicated of a contract made between the parties, in the light of an existing statute. In other words, an insurance company, at a time when the State made a policy a valued one,

insured a piece of property in the sum of $800.00. The property was destroyed. Accordingly, the insurance company was required to pay $800.00, and was not permitted to say the property was worth less. The net result, however, is that in the Daggs case, the plaintiff recovered $800.00 without any actual damage having been sustained in excess of $100.00. Because, for the purpose of passing on the demurrer to the answer, the fact stated in the answer, that the property was not worth more than $100.00, must be taken as true.

In the Daggs case was the insurance company deprived of $700.00 without due process of law? This Court answered the inquiry in the negative.

In the case at bar, the carrier, in the light of a constitutional provision forbidding the charging of a greater rate for a less distance, voluntarily entered into a contract with one shipper which violated the constitutional provision. The carrier, by its voluntary act, thus established as the legal rate to be charged to the plaintiff, the less amount charged another shipper for a greater distance.

In the light of the ruling in the Daggs case, how can the carrier in the case at bar lay claim that the carrier is being deprived of its property without due process of law, when all that the carrier is required to do is to refund to the shipper the excess rate charged.

Plaintiff in error (Brief, p. 21) cites Commerce Commission v. Railroad 145 U. S. 263. In that case, this Court was construing the Interstate Commerce Act.

"We are not unaware of our decision in Texas & Pacific Railway v. Interstate Commerce Commission 162 U. S. 197 in which, on review of the Interstate Commerce Act, we held that a mere inequality of rate was not always proof of undue discrimination, but we were passing upon an act of Congress and seeking to ascertain its intent and scope. **There was no intima-**

tion that it was not within the power of Congress to prescribe an absolute equality of rate.

"In the present case we are not construing an act of the State of Mississippi or passing upon the powers which by it are given to the state railroad commission. Those matters are settled by the decision of the Supreme Court of the State * * *"

Alabama etc. Ry. Co. v. Mississippi Railroad Commission 203 U. S. 496, 501.

The case of United States v. Railroad 127 Fed. 785 cited by Plaintiff in Error Brief p. 22 also arose under the Interstate Commerce Act.

Plaintiff in error cites a ruling of the Public Service Commission of Missouri (Brief, pp. 22, 23.) It is not entirely clear to us whether this citation is for the purpose of enabling this Court to overrule the Supreme Court of Missouri with respect to its construction of the Constitution of Missouri (which of course this Court will not do) or for the purpose of adding force to the ruling of the Supreme Court of Missouri (which so far as this Court is concerned, is unnecessary.) The Commission rules (Brief, p. 23) a railroad company "cannot charge more for the fifty-mile haul than it does for the hundred mile haul."

In the case at bar (Petition, Brief, p. 3) the carrier charged one person 80 cents per ton to haul coal 61.95 miles, and charged another 50 cents per ton to haul coal 77.14 miles.

We are next told: "The strict enforcement of Section 3173 would confiscate the property of every common carrier and drive them all from the State of Missouri." (Brief of Plaintiff in Error, p. 24.) No such defense is made in the answer nor established by the evidence. All this is necessary before this Court will nullify the provision in a State constitution or law.

Louisville & Nashville R. R. Co. v. Finn 235 U. S. 601, 610;

Kendrick v. Maryland 235 U. S. 610, 621;

Chicago etc. Ry. Co. v. Wellman 143 U. S. 339;

Atlantic Coast Line v. Florida 203 U. S. 256;

Missouri Rate Cases 230 U. S. 474, 508, 509.

The illustration comparing rates between two points in Missouri, Rich Hill and Joplin, and between two interstate points, Pittsburg, Kansas, and Joplin, Missouri, (Brief of Plaintiff in Error, pp. 24, 25) falls short of the mark, when read in connection with Louisville & Nashville R. R. Co. v. Eubank 184 U. S. 27. In that case, the rate on tobacco per one hundred pounds between two points in Kentucky, Franklin and Louisville, a distance of 134 miles, was 25 cents. The rate between Nashville, Tennessee, and Louisville, Kentucky, 185 miles, was 12 cents. Held, the lower interstate rate could not be made the basis of a complaint under a state statute. Note especially, 184 U. S. 40.

We are next cited to the dissenting opinion of a minority of the Supreme Court of Missouri, 230 Mo. (Printed Record, p. 105). Brief of Plaintiff in Error, pp. 25-27. To this, we reply: If the views of the dissenting judges had become the law of the case, the pending writ of error would never have been sued out. This Court is concerned only with prevailing opinions in state courts. Dissenting opinions are obiter.

It is next claimed that Revised Statutes of Missouri 1909 Section 3173 "and the enforcement of the provisions of said section by the Supreme Court of Missouri, deprive defendant railroad company of its property without due process of law, and deny to it the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States." (Brief of plaintiff in error, pp. 28 et seq.)

The section cited is set out in full in the brief of the plaintiff in error, page 9. Section 3173 creates no penalty, nor fixes any measure of damages. It forbids the charging of a greater rate for a shorter distance. In this respect, the statute is a replica of Article 12 of Section 12 of the Constitution of

Missouri hereinbefore quoted in full (**ante** p. 29). The Supreme Court of Missouri has held the section of the Constitution to be self-enforcing, and that in an action under the section of the Constitution quoted, the measure of damages is the excess rate paid.

So that, reduced to its last analysis, the contention of the plaintiff in error is this: A sovereign State, both in its constitution and in its statutes, has enacted a rule of conduct for a railroad corporation doing business in that State, and organized under the laws of that State. The railroad corporation is the creature of the laws of the State authorizing its incorporation. The creator says to the creature, "You must not charge more for a shorter distance than for a greater distance." The railroad corporation violates the injunction of its creator; it collects 80c from one person for a distance of 61.95 miles; it collects 50c from another person for a distance of 77.14 miles. The highest judicial authority of the State of the plaintiff in error has ruled that in so doing the plaintiff in error had received 30c in money which belonged to the defendant in error, and ordered that the 30c in money so illegally exacted by the plaintiff in error, of the defendant in error, should be restored by the plaintiff in error to the defendant in error.

We are now confronted with the contention that the plaintiff in error, in restoring to the defendant in error money which belongs to the defendant in error, is being deprived of property belonging to the plaintiff in error. But the railroad company is not deprived of anything which rightfully belongs to it. The railroad company is merely being ordered to restore to the shipper that which belongs to the shipper, i. e., the excess rate charged him.

This Court is asked to strike down a provision in the constitution of a State regulating the charges of a common carrier organized under the laws of the State adopting the constitution.

In support of this contention, the first case cited is Penna.

Railroad Company v. International Coal Co. 230 U. S. 184. That case arose under the interstate commerce act. It was the contention of the railroad company in that case that:

> "To entitle the plaintiff to recover, the jury must be satisfied that it sustained some loss or injury due to the fact that the defendant was carrying at the same time, at lower rates, coal shipped by other shippers." (230 U. S. 188.)

No question of constitutional law arose. This Court, in the exercise of an original jurisdiction, was construing a provision of an act of Congress. The Court pointed out:

> "* * * The English courts make a clear distinction between overcharge and damages, and the same is true under the Commerce Act. For, if the plaintiff here had been required to pay more than the tariff rate, **it could have recovered the excess not as damages, but as overcharge.** (230 U. S. 202.)
>
> "Having paid only the lawful rate, plaintiff was not overcharged, though the favored shipper was illegally undercharged. * * Making an illegal undercharge to one shipper did not license the carrier to make a similar undercharge to other shippers." (230 U. S. 202.)

The Court, in that case, was dealing, as already stated, with the interstate commerce act, which fixes a legal rate, being the published tariff. The plaintiff in that case paid only the legal rate, namely, the published tariff. In the case at bar, the Supreme Court of Missouri was not dealing with a law which contemplated the publication of a tariff containing a legal rate. In Missouri, as between a less rate charged for a greater distance, and a greater rate charged for a less distance, the former becomes the legal rate.

The Court continued:

> "This conclusion, that the right to recover is limit-

ed to the pecuniary loss suffered and proved, is demanded by the language of the statute. * *" (230 U. S. 206.)

In the case just cited, there is a vigorous dissent by Mr. Justice Pitney 230 U. S. 208 et seq. Let us assume, for the sake of illustration, that the views of Mr. Justice Pitney had become the views of the Court and the law of the case. Could it have been contended, in so interpreting the act of Congress, as to create a cause of action for the difference in the rate paid by one shipper and another, that the carrier "was being deprived of its property without due process of law?"

It will be recalled, this Court is not now sitting in judgment upon the correctness of the views outlined by the Supreme Court of Missouri. The only question is, do the Missouri constitution and statutes, as construed by the Supreme Court of Missouri, violate the Federal Constitution?

The citation of 2 Elliott on Railroads Sec. 686 is not apposite to the case at bar. In the section cited, the author is discussing "the right of a railroad company to receive reasonably remunerative compensation for carrying property and passengers (which) is a property right of which it cannot be deprived, and hence it is entitled to a hearing upon this question whether rates fixed by the Commission are reasonable."

In the case at bar, the State of Missouri has not undertaken either by the constitution or by the sections of the statute now under consideration, to fix any rates whatever. The State has simply declared that a higher rate shall not be charged for a less distance.

2 Hutchinson on Carriers 3 Ed. Sec. 574 is cited by the plaintiff in error (brief, p. 28.) We quote from the section cited:

"It is well settled that it is within the power of the state legislature to prevent unjust and unreasonable discrimination by the carriers operating within the

state, and that except where the power has been clearly renounced in the charter of the carrier, it is competent for the legislature to regulate, within reasonable limits, the rates that may be charged by common carriers for the transportation of passengers and property within the state. * * * Rates in excess of those authorized by the law, which have been exacted by the carrier and paid by the shipper to secure transportation, may be recovered back."

Citing Transportation Co. v. Sweetzer 25 W. Va. 434.

Reagan v. Farmers Loan & Trust Company 154 U. S. 362 was an appeal from a Federal Circuit Court to the Supreme Court of the United States, in which it was ruled that it was within the power of a court of equity to decree that the rates established by a railroad commission were unreasonable and unjust. No question of discrimination arose in that case. It was ruled that a railroad commission did not have the power to make rates so low that the railroad could not be operated at a profit. In the case at bar, the liability of the carrier is predicated of its own act, namely, the fixing of a lower rate for a greater distance.

Chicago etc. Railway Company v. Minnesota 134 U. S. 418 (cited by plaintiff in error, brief, p. 28), decided that an act of a legislature which provided "that the rates of charges for the transportation of property recommended and published by the (Railroad) Commission, shall be final and conclusive as to what are equal and reasonable charges, and there can be no judicial inquiry as to the reasonableness of such rates, and a railroad company, * * * not being allowed by the state court to put in testimony on the question of the reasonableness of such rates" is in conflict with the due process clause, and the equal protection of the laws clause, of the Fourteenth Amendment to the Constitution of the United States.

The Court said (134 U. S. 456, 457):

"* * * * We are of the opinion that (the statute)

> so construed, conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions, or possessing the machinery of a court of justice."

Smyth v. Ames 169 U. S. 466 was an appeal from a federal circuit court to the Supreme Court of the United States. The Court ruled (169 U. S. 526):

> "While rates for the transportation of persons and property within the limits of a State are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such protection as the Constitution cannot be so conclusively determined by the legislature of the State, or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry."

No question of discrimination arose in Smyth v. Ames. The whole question was one of reasonableness of rates.

In Sharpless Co. v. Lawrence 213 Fed. 423-427, the question arose whether, in an action for unfair competition, the plaintiff was limited to the damages sustained by the plaintiff, or was entitled to recover the profit made by the defendant. That is an instance of judicial interpretation, not of depriving a person of property without due process of law.

By way of illustration, in Hamilton-Brown Shoe Company v. Wolf Bros. & Company 206 Fed. 611 the Circuit Court of

ppeals for the Eighth Circuit ruled that in an action for unfair mpetition, the plaintiff was entitled to recover all the profits hich the defendant had made. This Court issued a writ of rtiorari, and the case, on reaching this Court (240 U. S. 251) as disposed of upon another ground.

Suppose this Court had disposed of the case cited on the round that it did present a question of unfair competition, nd that in a case involving unfair competition, defendant is able to plaintiff for all the profits which the defendant has made y means of the alleged unfair competition: Could defendant ay that he was being deprived of his property without due pro- ess of law? In such a case, the defendant has had due process f law. A suit has been heard in a court; the court has differed ith the defendant as to the measure of damages, but that is ot depriving the defendant of his property without due process f law.

Homestead Company v. Des Moines Electric Company 226 ed. 49-53 is cited by the plaintiff in error (brief, page 28). In hat case the plaintiff, the publisher of a newspaper, sued a pub- ic service corporation furnishing electric light and power. It as claimed that the defendant was demanding and receiving rom the plaintiff the established published rates for light and ower, "while the defendant at the same time, and under like onditions, and without any cause for such discrimination," harged competitive newspapers a rate equivalent to 42 per cent f the published rate.

> "Plaintiff asks judgment for $8,471.81, being the difference between the amount of the published rate charged the plaintiff, and the reduced rate charged its competitor as aforesaid."
>
> "* * The rate fixed by ordinance must be assumed to be a reasonable rate. The plaintiff not having paid in excess of the ordinance rate, cannot recover upon any

theory that the rate paid was unreasonable." (226 Fed. 50.)

But in the case at bar, the statute makes the legal rate the less rate which is charged for the greater distance. In other words, the greater rate charged for the less distance is the illegal rate, and is in excess of the legal rate, namely, the less rate for the greater distance.

Judge Wade ruled:

> "I cannot agree with counsel for defendant that mere discrimination in rates furnishes no cause of action for damages to a person injured thereby. A public service corporation cannot charge one patron one price, and a competitor another price for the same service, even though the higher rate may not be in excess of the legal rate."

Judge Wade quotes from an Iowa case to the effect that a carrier "is bound to carry for all at the same price, unless there is some special reason for the distinction." (226 Fed. 51.)

Judge Wade further ruled:

> "Any person or corporation who violates this law, is liable to damages to any person injured as the direct and proximate result of such unlawful act. * * * On the other hand, **in the absence of statute,** a person not injured by such unlawful act cannot recover."

Judge Wade further said:

> "Most of the cases have arisen with reference to discrimination in railway rates. Many courts have held that the person paying the higher rate for transportation of freight is entitled to recover the difference between the rate paid and the lower rate charged a competitor. As applied to railway rates, this ruling might be upheld, where it was shown that the person who received the favor of a lower rate was in direct com-

petition with the person who paid the higher rate, and and that shipments were made by each, of the same kind of property, under the same conditions, to the same market, and sold under the same or similar conditions. In such case it might appear that the difference in the rate would be the actual injury suffered." (246 Fed. 52.)

Speaking of the several newspapers involved in the case cited, Judge Wade said (226 Fed. 53):

"While in a sense the parties would be competitors, yet they are not competitors in such a sense as that the difference in the rate charged for electricity would be the true measure of damages arising out of the fact that one received a lower rate than the other. If the other party was entitled to a lower rate, **as a matter of law,** then, of course, the difference between that and the higher rate would be the true measure."

Judge Wade called attention to the fact that in Penna. Co. v. International Coal Company 230 U. S. 184 this Court had ruled:

"But it does not at all follow that the amount of injury suffered is the difference in the rate charged. **It might be, or it might not be,** but in any event it must be a subject of proof."

But in the case at bar, the Court is not sitting as the Supreme Court of Missouri. The Court is not called upon to determine whether, sitting as the highest court of a State, it would have ruled that under a statute of the State, proof of actual damages was necessary. The question is, the Supreme Court of the State having ruled that the damages are fixed by the excess rate charged, is such conclusion of the Court a deprivation of the property of defendant without due process of law?

Lehigh Valley Railroad Co. v. American Hay Co. 219 Fed.

539-541 was an action for damages brought in a federal court, dealing with Section 16 of the Interstate Commerce Act, and presented a question of interpretation of that section of the act. No question of constitutional law was involved. Indeed, Judge Lacombe said:

> "As a matter of first impression, it would seem that when one shipper is made to pay to a railroad, through discrimination either in rebates or in charges for special services, a definitely ascertained larger sum than his competitors are charged for transportation of goods, he is damaged to that amount, for at least there is a **prima facie** showing of damages sustained by himself."

That case, it will be seen, is predicated largely of Lehigh Valley Railroad Company v. Meeker 211 Fed. 785. The last cited case reached this Court and is reported Meeker v. Lehigh Valley Railroad Company 236 U. S. 412, 35 Sup. Ct. Rep., 328.

In this court, the decision of the Supreme Court of Appeals for the Third Circuit, cited as authority in the American Hay Company case, was reversed and the judgment of the District Court awarding damages affirmed, after eliminating an item of attorney's fees.

In the Meeker case 236 U. S. 412 this court first discussed the question of limitations. Next the court discussed the reports and orders of the Interstate Commerce Commission.

> "Another objection which was directed against the orders, as well as the reports, is that they contain no findings of fact, or at least, not enough to sustain an award of damages."

It will be recalled, in the Meeker case, the amount of the judgment in the District Court was $109,280.17. The Interstate Commerce Commission found that the Lehigh Valley Railroad charged Meeker rates which "were unjustly discrimina-

tory in violation of Section 2 of the (Interstate Commerce) act to the extent that they exceeded the rates contemporaneously charged to Lehigh Valley Coal Company under the contract then in effect between that company and defendant."

The Commission further found that Meeker had paid rates aggregating an amount stated, "that complainant (Meeker) has been damaged to the extent of the difference between the amount which he did pay and * * * the amount which he would have paid had he been given the benefit of the rates applied by defendant to similar shipments of the Lehigh Valley Coal Company."

It was further found by the Commission that Meeker had paid rates found by the Commission "to have been unreasonable; that complainant has been damaged to the extent of the difference between the amount which he did pay * * * and the amount which he would have paid at the rates found reasonable."

This Court ruled:

> "The Commission was authorized and required by Section 8 of the act to regulate commerce to award 'the full amount of damages sustained' and that, of course, was to be determined from the evidence. If it showed that the damages corresponded to the rebate in one instance and to the overcharge in the other, the claimant was entitled to an award upon that basis. The case of Pennsylvania R. R. Co. v. International Coal Mining Co. 230 U. S. 184, 57 Lawyer's edition 1446, 33 Sup. Ct. Rep. 893, is cited as holding otherwise, but it does not do so."

The leading case on the subject presented to this court in the case at bar, in Missouri, is McGrew v. Missouri Pacific Railroad Company 230 Mo. 496. In that case, it was ruled (page 547) that the section of the Constitution of Missouri (Sec. 12, Art. 12, hereinbefore cited) "without the aid of any statutory enactment, makes it unlawful for a railroad company to charge more for a shorter haul than a longer one of the same class of pro-

perty, in any direction (whether) the same or not, and under any and all circumstances and conditions," and fixed the measure of damages for doing the unlawful thing "in the absence of any statute upon the subject, at the amount of the excess charged for the shorter distance over that charged for the longer distance." Citing Western Union Telegraph Company v. Call Publishing Company 44 Neb. 326.

The case cited from Nebraska was twice before the Supreme Court of that State. On the first hearing (Western Union Telegraph Company v. Call Publishing Company 44 Neb. 326) it appeared that the Call Publishing Company was the publisher of a newspaper; that the telegraph company charged Call Publishing Company more for transmitting dispatches than the telegraph company charged a competitor. A statute was cited (44 Neb. 334) providing that:

> "It shall be unlawful for any telegraph company * * * * * to demand, collect or receive from any publisher or proprietor of a newspaper, any greater sum for a given service than it demands, charges or collects from the publisher or proprietor of any other newspaper for a like service."

It was pointed out (44 Neb. 338) that discrimination in favor of a patron having the larger business, tends to create monopoly, destroy competition, and is contrary to public policy.

> "The same objection can be urged to the giving of privileged rates for the purpose of obtaining the business of a particular patron, and a discrimination on this ground is, we think, very justly condemned by the House of Lords in the case of London & N. W. R. Co. v. Evershed, L. R., 3 App. Cases (England) 1029."

The measure of damages was thus stated:

> "The rule is, where is a telegraph company charges one person a higher rate than it exacts from another

for the transmission of dispatches under like conditions, the difference between the charges is the measure of damages the one who has been discriminated against is entitled to recover." (Citing authorities.)

The citation just made from the Supreme Court of Missouri is found in the dissenting opinion of Mr. Chief Justice Norval 44 Neb. 342, 346. That case was reversed and remanded for a new trial, and on the second trial (Western Union Telegraph Company v. Call Publishing Co. 58 Neb. 192) the plaintiff recovered. It is stated, upon the second trial, (58 Neb. 194):

> "As developed during the second trial they (the facts) were in the main similar to what appeared during the first."

No question was raised as to the measure of damages.

The case then reached the Supreme Court of the United States. (Western Union Telegraph Company v. Call Publishing Co. (181 U. S. 92.) It was stated:

> "It may be well at this time to notice what the exact rulings of the state courts were; the charge to the plaintiff was $5.00 per hundred words, and to the State Journal Company, $1.50 per hundred words. (181 U. S. 93.)
>
> "It is further insisted that even if there be a law which controls, there is no evidence of discrimination such as would entitle the plaintiff to the verdict which it obtained. But there was testimony tending to show the conditions under which the services were rendered to the two publishing companies, and it was a question of fact whether upon the differences thus shown, there was an unjust discrimination. And questions of fact, as has been repeatedly held, when once settled in the courts of a State, are not subject to review in this court." (181 U. S. 103.)

Now, in the case at bar, the petition pleaded (Brief of plaintiff in error, page 3):

> "Plaintiff avers that for the said carriage of said coal, defendant fixed, charged and demanded and received of the plaintiff, 80c per ton, an illegal freight rate, being 30c per ton more than defendant was by law entitled to fix, demand, charge and receive, in this, that during all said times and dates herein named, defendant had fixed, charged demanded and received for the carriage of the same class of coal over its said line, and over another part of said road"—

a less rate for a greater distance.

The question of the sufficiency of the proof to sustain this allegation does not arise under the Fourteenth Amendment to the Constitution of the United States.

Plaintiff in error lays stress on Hoover v. Pa. Rld. Co. 156 Pa. St. 220. That is a decision of a state court construing a statute of a State in which the court reached this conclusion:

" 'The amount of injury suffered' is the measure of the single damages to be allowed. But it does not at all follow that the amount of injury suffered is the differenec in the rates charged, it might, or might not be, but in any event it must be a subject of proof, and there was no proof in the case of the actual damage sustained." 156 Pa. St. 244.

But again this Court is reminded, this Court is not construing the Missouri statute. The construction of the Missouri statute is within the jurisdiction of the Supreme Court of Missouri not within the jurisdiction of this court.

Suppose the Pennsylvania court had reached the opposite conclusion; could the carrier in that case have pleaded a deprivation of its property without due process of law?

Parsons v. Chicago etc. Railroad Co. 167 U. S. 447 (cited by

plaintiff in error brief page 37) arose under the Interstate Commerce Act. It was a suit brought in a Federal Court, heard on appeal in the Circuit Court of Appeals and then removed to this Court by certiorari. The case went off on the proposition: "There is nothing therefore to show that the local rate charged plaintiff from the Iowa place of shipment to Chicago was greater than the other rate charged from Nebraska to the four places on the seaboard, or greater than that charged for shipment from the first place of shipment to the same four places." 167 U. S. 456.

In Central Coal & Coke Co. v. Hartman 111 Federal 96 cited by plaintiff in error, was a suit under the Sherman Anti Trust Law. It was tried in a Federal Court, and appealed to the Circuit Court of Appeals. No question of constitutional law was involved. The cause of action pleaded was that defendants had combined to decline to sell coal to Hartman. In such cases it was ruled "Compensation for the legal injury is the measure of recoverable damages. Actual damages only may be secured."

Knudsen-Ferguson Fruit Co. v. Michigan Cent. Rld. Co. 148 Federal 974 cited by plaintiff in error (brief p. 37) was an action under the Interstate Commerce Act.

The action was to recover $27 claimed to have been unlawfully exacted for the icing of a car load of grapes. It was claimed there was nothing in the filed schedules indicating an additional charge for icing in transit.

The court ruled: "* * * There was no proof that the amounts demanded by defendant and paid by plaintiff were in excess of the rates and charges separately specified in the schedules filed with the Commission; nor was it complained that the railroad company was guilty of discrimination against the plaintiff by the performance for others of like and contemporaneous service for a less consideration." 148 Federal 920.

III.

The third point of Plaintiff in Error arises under the Interstate Commerce clause of the Federal Constitution. (Brief, preface I, p. 27.) Coal was hauled between two points in Missouri, a distance of 61.95 miles apart at a rate of 80 cents per ton for one shipper, and other coal was hauled by the same carrier between two stations in Missouri, a distance of 77.14 miles apart, at a rate of 50 cents per ton for another shipper. It was stipulated (Brief of Plaintiff in Error, p. 11) "that the trains in which defendant hauled said cars of coal contained **other** cars and shipments" of an interstate character.

If this brings the shipper within the Interstate clause of the Federal Constitution, the day of state regulation of carriers is at an end. But the question of interstate commerce is not in the case.

Chicago etc. Ry. Co. v. The State Public Utilities Commission of Illinois No. 148 decided by this Court, January 8, 1917, and cas. cit.

In this last case, the Court ruled: "Some relation we may admit exists between the state and interstate service, but the evidence does not bring it within that certainty and precision of influence that induced the decision in Houston & Texas Ry. Co. v. United States 234 U. S. 342, but leaves it controlled by Minnesota Rate Cases 230 U. S. 352; Oregon R. R. & Navigation Co. v. Campbell 230 U. S. 525, and L. & N. R. R. Co. v. Garrett 231 U. S. 298."

"The statute cannot be said to interfere with interstate commerce unless such is its direct, immediate, and necessary effect. Louisville & Nashville Railroad Co. v. Kentucky 161 U. S. 677, 701, 16 Sup. Ct. 714, 40 L. Ed. 849; Louisville & Nashville Railroad Co. v. Kentucky 183 U. S. 503, 518, 22 Sup. Ct. 95, 46 L. Ed. 298."

Grand Trunk Ry. Co. of Canada v. Michigan Railroad Commission 198 Fed. 1009, 1021 (Knappen, Dennison and Sater, JJ.)

"The enforcement of the provisions of the Missouri statute would impose an unreasonable burden upon interstate commerce." (Brief of plaintiff in error, p. 27.)

Wilmington Transportation Company v. California Railroad Commission 236 U. S. 151 is cited. Wilmington Transportation Company was engaged as a common carrier of passengers and goods by sea between San Pedro, on the main land, and Avalon, on Santa Catalina Island, both places being within the county of Los Angeles in California. In going from one of these ports to the other, the vessels of the transportation company "must traverse the high seas for upwards of twenty miles." In doing so, however, the vessels did not "touch at any other port, either of the United States or of any foreign country."

It was ruled by the Court that the regulation of the rates of the transportation company was within the power of the State of California. It was said:

> "It must be assumed upon this record, that the State claims to exercise its authority only as to transportation between the main land and the island, and solely with respect to such shipments over this route as are local to the State, both as to the beginning and the end of the transportation."

Wabash etc. Railroad Company v. Illinois 118 U. S. 557 arose in these circumstances:

It was claimed that goods were carried from Peoria in the State of Illinois to New York City for one shipper, at one rate, and that goods were carried from Gilman in the State of Illinois to New York City, a less distance than from Peoria, for a greater rate. The cause of action was predicated of a statute which forbade the charging

"for the transportation of any passengers or freight

> of any description upon its railroad, for any distance within the state, the same or a greater amount of toll or compensation than is at the same time charged, collected or received for the transportation of the same direction of any passengers or like quantity of freight of the same class, over a greater distance of the same road."

It was distinctly ruled

> "if the Illinois Statute could be construed to apply exclusively to contracts for a carriage which begins and ends within the State, disconnected from a continuous transportation through or into other states there does not seem to be any difficulty in holding it to be valid."

But if the case arose out of shipments made from a point in the State of Illinois to a point without the State of Illinois, the statute was held void to the extent that it interfered with interstate commerce.

But the cases cited (**ante** pages 64, 65,) conclusively demonstrate, the question of interstate commerce has nothing to do with the case at bar.

IV.

The first point made by Plaintiff in Error, as to the penal character of section 3211, Revised Statutes of Missouri, 1909, does not arise in the case at bar.

"The statute is assailed as unconstitutional on its face, as denying the equal protection of the law because imposing, as alleged, such severe penalties for disobedience of its provisions as to deter parties affected thereby from testing its validity in the courts. Exparte Young, 209 U. S. 123, 28 Sup. Ct. 411, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, is relied upon to support this contention. But, without regard to the question whether the penalties provided by this statute are so excessive as to be

void, it is sufficient to say that we have not before us an action for the recovery of penalties, that the penalties are embraced in a section by themselves, and thus plainly separable from the provisions here involved; and the question of the constitutionality of the penalty clause may properly be left to be determined should an effort be made to enforce the same. Willcox vs. Consolidated Gas Co. 212 U. S. 19, 53, 54, 29, Sup. Ct. 192, 53 L. Ed. 382; United States vs. Delaware & Hudson Co. 213 U. S. 366, 417, 29 Sup. Ct. 527, 53 L. Ed. 836; Granada Lumber Co. vs. Mississippi 217 U. S. 433, 443, 30 Sup. Ct. 535, 54 L. Ed. 826."

Grand Trunk Railway Co. of Canada vs. Michigan Rd. Comm. 198 Fed. Rep. 1009, 1921.

Southern Pacific Co. vs. Campbell 230 U. S. 537, 553.

Louisville & Nashville R. R. Co. vs. Garrett 231 U. S. 298, 311.

In considering the first point made by the plaintiff in error: "Section 3211 Revised Statutes of Missouri (1909) is unconstitutional and void, because the penalties authorized by it are unreasonable and oppressive, and the statute is in violation of the Fourteenth Amendment of the Constitution of the United States" (Brief of plaintiff in error, p. 17), regard must be had to the following:

(a) The Supreme Court of Missouri has ruled that the constitutional provision, Constitution of Missouri, Article 12, Section 12, which provides: "It shall not be lawful in this State for any railroad company to charge for freight or passengers a greater amount, for the transportation of the same, for a less distance than the amount charged for any greater distance" is self-enforcing. (Printed Record pp. 71 et. seq.)

The constitutional provision contains no penalty clause. The same court also ruled (Printed Record p. 71) the measure of damages in favor of a shipper who paid a greater rate for a shorter distance "is the amount of the excess charged for the shorter distance over that charged for the longer distance."

The petition in the case at bar does not plead a cause of action for a recovery of a penalty. The first count is set out in the brief of plaintiff in error. Pages 2-4. The prayer is for the amount of the illegal freight charge, $130.05 "and for damages not exceeding $1,000.00." The recovery on the first count, printed record p. 6, is in the sum of $130.05.

The plaintiff in the court below recovered precisely "the amount of the excess charged for the shorter distance over that charged for the longer distance."

The Supreme Court of Missouri has ruled this is permissible, under the Constitution of Missouri, which as already stated provides for no penalty, and that interpretation of the Constitution of Missouri is binding on this court. (See authorities, supra.)

The cases cited by the plaintiff in error (brief pp. 17 et seq.) have no bearing upon the case at bar. It must be recalled this is a writ of error to revise the final judgment of the highest court of a state. It is not a suit in which this court is exercising jurisdiction over a Federal Court in a case originating in a Federal Court.

Cotting v. Kansas City Stock Yards Company also reported as Cotting v. Goddard 183 U. S. 79, 22 Supreme Court 30, 46 L. Ed., 92, originated in the Circuit Court of the United States for the District of Kansas, and was a suit by a stockholder of a stock yards company to enjoin the enforcement of a statute of the State of Kansas.

The principal opinion in the case is by Mr. Justice Brewer, and in the course of his opinion, the Judge engages in some discussion with respect to the question of penalties and then adds: "But it is not necessary to rest our decision upon this consideration."

Then six of the members of the Court (Mr. Justice Harlan, Mr. Justice Gray, Mr. Justice Brown, Mr. Justice Shiras, Mr.

Justice White, and Mr. Justice McKenna) filed a separate opinion:

> "We assent to the judgment of reversal,—so for as the merits of this case are concerned—upon the ground that the Statute of Kansas in question is in violation of the Fourteenth Amendment of the Constitution of the United States, in that it applies only to the Kansas City Stock Yards Company, and not to other companies or corporations engaged in like business in Kansas, and thereby denies to that company the equal protection of the laws.
>
> "Upon the question whether the statute is unconstitutional, upon the further ground that by its necessary operation, it will deprive that company of its property without due process of law, we deem it unnecessary to express an opinion."

The next case cited by plaintiff in error is Willcox v. Consolidated Gas Company 157 Fed. 849, 212 U. S. 19. That suit was a bill in equity to restrain the enforcement of a statute. In the trial court, Judge Hough observed: "I am of the opinion that the penalty clauses in both statutes are clearly obnoxious to the remarks of Mr. Justice Brewer in the Cotting case."

But when the Willcox case reached this Court (212 U. S. 19) the acts of the Legislature of the State of New York were held not confiscatory and the suit was dismissed, the Court observing:

> "We are of the same opinion as to the penalties provided for a violation of the acts. They are not a necessary or inseparable part of the acts, without which they would not have been passed. * * * When the objectionable part of a statute is eliminated, if the balance is valid and capable of being carried out and if the court can conclude it would have been enacted, if

that portion which is illegal had been omitted, the remainder of the statute thus treated is good." (212 U. S. 53, 54.)

In the case at bar, not only the constitutional provision cited, but also Section 3173 of the Revised Statutes of the State of Missouri 1909 which does not contain a penalty clause, forbid the charging of a greater amount for a shorter distance. The cause of action in this case does not depend on Section 3211. It depends on the proposition that by the constitutional provision and Section 3173, the charging of a greater amount for a shorter distance is prohibited. The measure of damages is fixed by the Supreme Court of Missouri; that is, the excess rate paid.

Ex parte Young 209 U. S. 123, 28 Supreme Court Rep., 441, arose in these circumstances: A suit was brought in a Federal Court in Minnesota to enjoin the enforcement of a state statute. The Attorney General of Minnesota was fined $100.00 for contempt of court. A writ of habeas corpus was sued out. The petition was dismissed in this Court and the Court ruled:

"It is urged that there is no principle upon which to base the claim that a person is entitled to disobey a statute, at least once, for the purpose of testing its validity, without subjecting himself to the penalties for disobedience provided by the statute in case it is valid.

"This is not an accurate statement of the case. Ordinarily a law creating offenses in the nature of misdemeanors or felonies relates to a subject over which the jurisdiction of the legislature is complete in any event.

"In the case, however, of the establishment of certain rates without any hearing, the validity of such rates necessarily depends upon whether they are high enough to permit at least some return upon the investment (how much it is not now necessary to state),

and an inquiry as to that fact is a proper subject of judicial investigation. If it turns out that the rates are too low for that purpose, then they are illegal. Now, to impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that, if unsuccessful, he must suffer imprisonment and pay fines, as provided in these acts, is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid.

"The distinction is obvious between a case where the validity of the act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character, and the ordinary case of a statute upon a subject requiring no such investigation, and over which the jurisdiction of the legislature is complete in any event."

It must be remembered that in the Young case, a violation of the act was made a misdemeanor punishable by imprisonment in the county jail for a period not exceeding ninety days.

"Each violation would be a separate offense, and therefore, might result in imprisonment of the various agents of the company who would dare disobey, for a term of ninety days for each offense. Disobedience of the officer renders the party guilty of a felony and subject to a fine not exceeding $5000.00 or imprisonment in the state prison for a period not exceeding five years, or both fine and imprisonment."

In the case at bar, the section of the statute now under consideration (3211) creates no criminal liability. The carrier is liable for a sum "not exceeding $1,000.00 and costs of suit,

including a reasonable attorney's fee." In the case at bar no attorney's fee is recovered.

The liability of an officer, agent or employee is predicated of his having "knowingly or willfully violated the provisions of this article."

The case at bar presents a simple question, the charging of a greater rate for coal for a shorter distance to one shipper than for a longer distance to another shipper. It is not a case "where the validity of the act depends upon the existence of a fact, which can be determined only after investigation of a very complicated and technical character."

But when the case of Simpson v. Shepard 230 U. S. 352, 33 Supreme Court 729, out of which the Young case emanated, came before this Court on its merits, the Court ruled that: "The penalty provisions being separable," the question at issue was to be determined in the light of two considerations:

(1) The effect of the legislation on interstate commerce; and,

(2) Its alleged confiscatory character.

As to some of the carriers involved in the case of Simpson v. Shepard, the rates were held valid and the suits dismissed, without prejudice; as to one of the carriers the rates were held confiscatory.

In Missouri Pacific Railway Company v. Tucker 230 U. S. 340, 33 Supreme Court Rep., 961, the statute fixed "the sum of $500.00 as liquidated damages." The judgment was for $500.00. That was a case in which the Legislature prescribed a schedule of maximum rates. "Being a common carrier the company is not at liberty to accept or decline shipments of oil."

In the case at bar the company is at liberty to decline shipping goods a longer distance for a shorter rate. In fact, such is the law governing the carrier.

The Court ruled:

"Experience teaches that to secure adherence to rates, even when lawfully prescribed, it is essential that deviations from them be discouraged by adequate liabilities and penalties."

The Court pointed out:

"In the present case the shipment was of 25 barrels for a distance of 300 miles, and the excess over the legislative rate, $3.02, was less than 1-150 of the authorized recovery.

"As applied to cases like the present, the imposition of $500 as liquidated damages is not only grossly out of proportion to the possible actual damages, but is so arbitrary and oppressive that its enforcement would be nothing short of the taking of property without due process of law."

In Wadley Southern Railway Company v. Georgia 235 U. S. 651, 35 Supreme Court Rep., 214, it was held that a section of the Georgia Civil Code which authorized the imposition upon a railway company of a penalty of $5000.00 per day for violating a lawful administrative order of a State Railroad Commission, did not deny to the company the equal protection of the laws or due process of law, the carrier having a right to a judicial review of the validity of the order by a suit against the Commission.

In the case at bar, the liability of the defendant to pay the damages prescribed in the section now under consideration is predicated of a judicial ascertainment of a fact, namely that the defendant has charged more for a shorter distance than for a greater distance, a fact easily ascertainable by the defendant itself, and having as a basis for its existence, only the action of defendant.

In Dow v. Beidelman 125 U. S. 680 it appeared that the state of Arkansas by statute had fixed at three cents a mile a maximum fare that any railroad might take for carrying a passenger within that state on any line over 75 miles in length. It was further provided that a person violating the law

> "should forfeit or pay for every such offense any sum not less than $50.00, nor more than $300.00, and costs of suit including a reasonable attorney's fee to be taxed by the court where the same is heard on original action, on appeal or otherwise, to be recovered in a suit at law by the party aggrieved in any court of competent jurisdiction." 125 U. S. 691, 692.

The plaintiff recovered a judgment "for a penalty of $50 and a counsel fee of $25.00." 125 U. S. 685. The judgment was affirmed in this Court, such eminent counsel as Mr. U. M. Rose contenting himself with the claim that the statute was unconstitutional because it denied the railroad company a sufficient income to enable it to operate its road.

In Carroll v. Pac. Ry. Co. 88 Mo. 239 57 Am. Rep. 382, the section of a statute in the State of Missouri creating a cause of action for the death of another fixed the measure of damages at five thousand dollars. The court said:

> "A second special defense set up in the answer challenges the constitutionality of the second section of the act concerning damages, for the reason that said section attempts to deprive defendant of its property without due process of law in authorizing a judgment against it as one of a special class of individuals in violation of the Fourteenth Amendment of the Constitution of the Federal Union, and in violation of section 30, article 2, of our state constitution and in arbitrarily liquidating and admeasuring the quantum of damages without a trial by jury as to the amount thereof, the

same being preserved to defendant by article 7 of the Constitution of the United States. * * * *

"The damage act and said section thereof has long been in our statutes and frequently before the court and many recoveries have been had thereunder, and while so far as we are aware this section has not been assailed in this court, on this or other grounds, yet the same argument and constitutional objections that the damages are arbitrarily fixed by the statute, would invalidate a very large number of other sections in our statutes and collated in the case of Humes v. this defendant 82 Mo. 228. Indeed the constitutional objections which are raised have been heretofore urged against, or apply in principle to other sections and provisions in our law, and notably to section known as the 43rd section of the railroad law (the double damage act) the constitutionality of which in respect to both state and Federal constitutions has been repeatedly affirmed."

It is interesting to note the case in question was not taken to the Supreme Court of the United States.

Humes v. Missouri Pacific Railway Company, was considered by this Court on a writ of error to the Supreme Court of Missouri 115 U. S. 512, 6 Sup. Ct. Rep. 110, where the Court said:

"It is hardly necessary to say that the hardship, impolicy, or injustice of state laws is not necessarily an objection to their constitutional validity; and that the remedy for evils of that character is to be sought from the State Legislature. Our jurisdiction cannot be invoked unless some right claimed under the Constitution laws or treaties of the United States is invaded. This Court is not a harbor where refuge can be found from every act of ill-advised and oppressive State legislation."

In that case an action was brought against the Missouri Pacific Railway Company to recover in double its value, damages, for killing a mule, the property of the plaintiff, of the value of $135. The action was brought under a statute of a State which provides that all railroad companies operating railroads in the State shall construct and maintain certain fences, cattle guards, etc., and shall be liable in double the amount of damages occasioned by its failure to so construct or maintain fences, or cattle guards.

Judgment was finally awarded plaintiff for the amount of $270 and costs. All the contested questions were raised and the case was then carried to the Supreme Court of the United States where a judgment of the lower court was confirmed after full consideration and argument.

This Court further says:

> "The power of the State to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced, whether at the suit of a private party or at the suit of the public, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion. The statutes of nearly every State of the Union provide for the increase of damages where the injury complained of results from the neglect of duties imposed for the better security of life and property, and make that increase in many cases double, in some cases treble, and even quadruple the actual damages. And experience favors this legislation as the most effective mode of preventing, with the least inconvenience the commission of injuries. The decisions of the highest courts have affirmed the validity of such legislation. The injury actually received is often so small that in many cases no effect would be made by the sufferer to obtain redress, if the private interest

were not supported by the imposition of punitive damages.

"The objection that the statute of Missouri violates the clause of the fourtenth amendment, which prohibits a state to deny to any person within its jurisdiction the equal protection of the laws, is as untenable as that we have considered. The statute makes no discrimination against any railroad company in its requirements. Each company is subject to the same liability, and from each the same security, by the erection of fences, cattle guards and gates, is exacted when its road passes through, along or adjoining inclosed or cultivated fields or uninclosed lands. There is no evasion of the rule of equity where all companies are subjected to the same duties and liabilities under similar circumstances. See, on this point, Barbier v. Connolly 113 U. S. 27, S. C. 5 Sup. Ct. Rep. 357; and Soon Hing v. Crowley 113 U. S. 703, S. C. 5 Sup. Ct. Rep. 730."

In Chicago Burlington & Qunincy Rld Co. vs. Cram 228 U. 70 this Court considered the cattle train speed act of Nebras- which established a rate of speed on branch lines within the te and imposed a penalty of $10 for each hour for each car it extends or prolongs the time of transportation beyond the riod, as liquidated damages to be recovered in an ordinary ion as other debts are recovered. 228 U. S. 71.

The shipper brought an action to recover $1,770, being the gregate of 25 violations of the law

This Court ruled: "We repeat * * * two propositions only are involved:—

(1) The power of the Legislature to impose a limitation of the time for the transportation of live stock;

(2) To provide a definite measure of damages

which may be difficult to estimate or prove.

> It is too late in the day to deny the position of the first power, and we think the other is as fully established, and that the statute was enacted to meet conditions which had arisen from the conduct of carriers and which in the judgment of the legislature demanded a remedy." 228 U. S. 84.

In the case just cited 228 U. S. 70 this court called attention to the fact that the Supreme Court of Nebraska compared the section of the Nebraska law in question in the case cited to

> "section 4966 Revised Statutes of the United States which provides for a liability of $100 for the first infringement of a copyright dramatic piece and $50 for the second performance."

The precise language of the section is that the infringing person,

> "shall be liable for damages therefor, such damages in all cases to be assessed at such sum not less than $100 for the first and $50 for every subsequent performance as to the court shall appear to be just."

In Brady v. Daly 175 U. S. 148 it appeared that Daly sued Brady and recovered judgment,

> "against the defendant of $50 for each performance falling within the period of two years prior to the commencement of the action; that is to say for 128 performances, for the sum of $6,300 with costs."

The judgment so recovered was affirmed by this Court. It was said:

> "We think section 4966 of the revised statutes upon which this suit is founded, is not a penal statute, therefore the action in this case is not one to recover a penalty or a forfeiture." 175 U. S. 153.

"The idea of the punishment of the wrong-doer, is not so much suggested by the language used in the statute as is the desire to provide for the recovery by the proprietor of full compensation from the wrong-doer for the damage such proprietor has sustained from the wrongful act of the latter.

"In the face of the difficulty of determining the amount of such damage in all cases the statute provides the minimum sum for recovery in any case leaving it open for a larger recovery upon proof of greater damage in those cases where such proof can be made and the statute itself does not speak of punishment or penalty but refers entirely to damages suffered by the wrongful act.

"Where the statute provides in terms, as the one before us does, for a recovery of damages for an act which violates the rights of the plaintiff and gives the right of action solely to him, the fact that it thereby provides that such damages shall not be less than a certain sum and may be more, if proved, does not as we think, transform it into a penal statute." 175 U. S. 156.

In the case at bar it is worthy of note, the statute complained of fixes a maximum liability the defendant is to pay "not exceeding $1,000." (Brief of plaintiff in error, page 10.) In fact, if anybody has the right to complain of the statute it is the shipper who may have been actually damaged, in a sum of more than $1,000 for a violation of the provisions of the law.

An interesting case in this connection is Boyd v. Missouri Pacific Railway Co. 249 Mo. 110.

A statute of Missouri provided that a common carrier

"should forfeit or pay as a penalty for every such person, employe or passenger so dying, the sum of not less than $2,000 and not exceeding $10,000 in the discretion

of the jury." 249 Mo. 121. "In the trial court defendant attacked the constitutionality of section 5425 Revised Statutes 1909, but the constitutional issues tendered have been abandoned." 249 Mo. 116.

Previously in Young v. St. Louis Ry. Co. 227 Mo. 307, it had been contended by defendant 227 Mo. 307

> "section 7804 of the damage act as amended in laws 1905 pp. 136, 137, is unconstitutional, because in actions against railroad companies it delegates to the jury the fixing of a penalty on a sliding scale at any sum from $2,000 to $10,000 within their discretion without furnishing any lawful basis for such discretion."

It was ruled the statute was constitutional.

In Minneapolis etc. Ry. Co. v. Beckwith 129 U. S. 26, plaintiff recovered double the value of three hogs killed by a railroad company.

In the Beckwith case 129 U. S. 266 this Court said:

> "The imposition of punitive or exemplary damages in each case cannot be imposed as in conflict with the prohibition against the deprivation of property without due process of law. It is only one mode of imposing a penalty for violation of a duty and its propriety and legality have been well recognized in Day v. Woodworth 13 How. 363, and by repeated judicial decisions for more than a century."

In Day v. Woodworth 13 How. 363-371 this Court said:

> "By the common as well as by statute law men are often punished for aggrieved misconduct or lawless acts by means of civil action and the damages inflicted by way of penalty or punishment given to the party injured."

In Minneapolis etc. Ry. Co. v. Emmons 149 U. S. 364, a statute requiring a railway company to fence its right-of-way provided for the recovery of treble damages suffered by any person in consequence of such neglect, the Court said:

> "There is no inhibition upon a state to impose such penalties for disregard of its police regulations as will insure prompt obedience to their requirements. For what injuries the parties violating their requirements shall be liable, whether immediate or remote, is a matter of legislative discretion. No discrimination is made against any particular railroad or corporation, all are treated alike and required to perform the same duty and therefore no invasions are attempted for inequality of protection ordained by the 14th amendment."

In Huntington v. Attrill 146 U. S. 657 Huntington recovered a judgment against Attrill in a state court in New York predicated of a liability created by a statute of the state of New York, which made the officers of a corporation who signed a record and false certificate of the amount of its capital stock, liable for all its debts. A state court in Maryland declined to enforce this judgment on the ground that it was in the nature of the enforcement of a penalty. The Court said of the New York statute:

> "But as it gives a simple remedy at law * * * to maintain such a suit is not to adminster a punishment imposed upon an offender against the statute, but simply to enforce a private right secured under its laws to the individual." 146 U. S. 676, 677.

In the case cited, the judgment of the state court declining to enforce the judgment in a sister State was reversed and the cause remanded.

The rule laid down in Mo. Pac. Ry. Co. v. Tucker 230 U. S. 34 is that the infliction of a penalty of $500 for an overcharge of approximately $3.00 "was so plainly arbitrary and oppres-

sive as to be nothing short of a taking of defendant's property without due process of law."

So in Western etc. v. Danneher 238 U. S. 482 in which penalties aggregating $6,300 were inflicted upon a telephone company.

In the case at bar the recovery is for the actual amount of excess freight paid.

In Kansas City Southern Ry. Co. v. Anderson 233 U. S. 325 it was held that

> "a statute may impose double damages and an attorney's fee on railway companies for failure to pay the amount of stock killed within a reasonable period after demand and award of the jury of the amount claimed before action commenced."

In Yazoo etc. Ry. Co. v. Jackson Vinegar Co. 226 U. S. 217 it was ruled:

> "The statute of Mississippi imposes a penalty on common carriers for failure to settle claims for lost or damaged freight in shipment within the state, within a reasonable specified period, is not unconstitutional under the Fourteenth Amendment as depriving the carrier of its equal protection of the laws as to claimants presenting actual claims for amounts actually due."

In the same case the Court ruled:

> "But this court must deal with the case in hand and not imaginary ones; it suffices therefor to hold as valid a case like the present statute, is valid. How the state court may apply it to other cases, whether its general words may be treated as more or less restrained and how far parts of it may be restrained, if others fail, are matters on which we may not speculate now." 226 U. S. 219, 220.

The case of Tucker v. The Mo. Pac. Ry. Co. 230 U. S. l. c. 348 is cited and relied upon by plaintiff in error, but the Kansas statute, upon which that case is founded, is essentially different from the Missouri statute upon which the case at bar is based. The Missouri statute leaves the amount to be recovered to the discretion of the triers of fact on evidence, **in no event to exceed $1,000.00.** This is not liquidated damages fixed by statute. While the Kansas statute arbitrarily fixes liquidated damages in a sum not less than $500.00.

In order that the Court may see the difference we herewith quote portions of each statute:

Gen. Stat. of Kan. 1909 p. 1532 Sec. 7165:

> "Provided that every such common carrier which shall either directly or indirectly give any rebate to any such shipper, or ship or agree to ship any of the products mentioned in this act for a rate less than that lawfully charged to other shippers under like circumstances, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in the sum of not less than $500.00, and forfeit its charter to do business in this state."

R. S. Mo. 1909 Sec. 3211:

> "Any railroad corporation * * shall forfeit and pay for any such offense any sum not exceeding $1,000.00."

In the case at bar, the rates upon which this suit is based were made by the railway company, and therefore presumptively remunerative, and cannot be regarded as confiscatory.

Indeed in O'Neil v. Vermont on a writ of error to the Supreme Court of the State of Vermont, it appeared that a man had been found guilty of 307 offenses for the sale of liquor in violation of the laws of Vermont. The defendant was fined

$6,140 being $20 for each offense and the costs of prosecution and ordered to be committed until the sentence should be complied with and it was adjudged if the fine and costs, aggregating $6,638.72 should not be paid before a day named, should be confined at hard labor in the House of Correction for 19914 days, being under the statute of the state three days for every dollar of the $6,638.72.

The writ of error was dismissed by this Court for want of jurisdiction.

> "The Supreme Court of the State decided the case before us on a ground broad enough to maintain its judgment without considering any Federal question."

In Western Union Telegraph Co. v. James 162 U. S. 650 the addresse of a telegram sued under a state statute to recover a penalty of $100, and also "the sum of $242.60 damages" for the non-delivery of a telegram. In the trial court, the addressee recovered both items mentioned. In the Supreme Court of Georgia, "that Court reversed the judgment so far as it was based upon the actual damages claimed but affirmed it as to the penalty of $100, provided for by the local statute. (162 U. S. 652.) The judgment was affirmed against a contention of an interstate nature. Neither the Court nor counsel (John F. Dillon) intimated "the impositions of a penalty for the violation of a duty which the company owed by the general laws of the land" (162 U. S. 660) was depriving the violator of his property without due process of law.

In the Dannaher case 238 U. S. 482 the penalties imposed were not held invalid for a lack of power to impose penalties. The true ground of the decision in the Dannaher case, as well as the decision in the Tucker case, is that the penaltes imposed wire so arbitrary and excessive, that, as imposed, they constituted a deprivation of the public utility of its property without due process of law.

In the case at bar, the carrier is only required to repay the excessive illegal rate charged.

In Chicago & Alton R. R. Co. v. Tranberger 238 U. S. 67, 35 Sup. Ct. Rep. 678, plaintiff in the court below recovered a judgment for damages and a penalty of $100.00 for the failure of a railroad company to construct transverse openings in rights of way and roadbeds to take care of surface water. The statute under review in that case provided that "any corporation, company or person failing to comply with the provisions of this section shall incur a penalty not to exceed $500.00 and be liable for all damages done by said neglect of duty."

The judgment for damages and imposing the penalty was affirmed by this Court. Counsel did not contest the power of the general assembly to impose a penalty against a common carrier for the violation of a duty validity created by law.

And after all we go back to the doctrine of the Waters-Pierce Oil Co. v. Texas 212 U. S. 86-111:

> "Again it is contended that the fines imposed are so excessive as to constitute a taking of defendants property without due process of law. The fixing of a punishment for crime or penalty for an unlawful act against its laws is within the police power of the state. We can only interfere with such legislation and judicial acts of the state enforcing it, if the fines imposed are so grossly excessive as to amount to a deprivation of property without due process of law."

In that case the defendant was fined at the rate of $1,500 a day for 1033 days, a total of $1,549,500.

In the circumstances of the case the judgment was affirmed.

EDWIN A. KRAUTHOFF,
Attorney for Defendant in Error.

ALEXANDER GRAVES,
WILLIAM S. McCLINTOCK,
ARTHUR L. QUANT,
MAURICE McNEILL,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916

No. [redacted] 229

THE MISSOURI PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR

vs.

McGREW COAL COMPANY, DEFENDANT
IN ERROR

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

Statement and Brief for Defendant in Error in Support of Motion to Affirm Judgment.

ALEXANDER [redacted]
Counsel for Defendant in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915

No. 601

THE MISSOURI PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR

vs.

McGREW COAL COMPANY, DEFENDANT IN ERROR

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

Motion by Defendant in Error to affirm the judgment of the Supreme Court of Missouri.

Now at this day comes the said defendant in error and moves this honorable court for an order to affirm the judgment of the Supreme Court of the State of Missouri to which the writ of error herein was allowed on the ground that it is manifest that the said writ of error was taken for delay only and that the questions on which the decision of this cause depend are so frivilous as not to need further argument.

ALEXANDER GRAVES,
Counsel for Defendant in Error.

Statement of the Case

The suit below was instituted by filing in the Circuit Court of Lafayette County, Missouri, a petition containing forty-sevn counts, each based upon illegal freight charges on shipments of coal in car lots from Myrick, Missouri, to some other station on plaintiff in error's railroad in the State of Missouri, made in violation of the Missouri constitution and statute.

Omitting the formal parts of the petition we will here insert one of the forty-seven counts therein as typical of them all:

"Plaintiff avers that on April, 1908 it was and still is a coal mining company incorporated under the law of the State of Missouri.

"Plaintiff for 1st cause of action avers that on October, 1879, the defendant was and has been ever since a railroad corporation duly organized under the law of said state and a common carrier for hire of freight and passengers between its stations hereinafter named in said state.

"That within five years last past and on the dates hereinafter named plaintiff produced and sold bituminous coal from its own mines near Myrick, one of defendants stations in said county, and that on various dates named in exhibit No. 1 and in the cars therein described by number and initial, it shipped by defendant's road from said Myrick in the aggregate 867,000 pounds of its said coal in car load lots to the consignee named in said exhibit at Strasburg, Mo., another station on defendant's station.

"Plaintiff avers that for the said carriage of said coal defendant fixed, charged and demanded and received of the plaintiff 80 cents per ton, an illegal freight rate, being thirty cents per ton more than defendant was by law entitled to fix, demand, charge and receive, in this, that during all said times and dates herein named defendant had fixed, charged, demanded and received for the carriage for the same class of coal over its said line and over another part of said road from its station of Liberal, Mo., and to another of its said stations viz, Granby in said State, a distance of 77.14 miles, 50 cents per ton by the car load while the distance from said Myrick to said Strasburg was only 61.95 miles for which said rate of 80 cents per ton for said carriage was fixed, charged, demanded and received of plaintiff as aforesaid; and the same was illegel and exceeded the amount the defendant

as entitled to fix, charge, demand and receive for said shipments
y the sum of $130 and 5 cents.

"And the plaintiff avers that it is damaged and aggrieved
y reason of said illegal freight charge in the sum of $130 and 5
ents; wherefore it prays judgment etc. etc.

(Printed record herein pp. 12-18.)

ANSWER

The answer to each of the counts of the petition is identical, nd that made to the first count only is here printed. This nswer, omitting formal parts is as follows:

"Comes now the defendant and for its answer to the 1st ount of plaintiff's petition, states that the same is founded upon he Session Laws of Missouri, 1872, page 69, now Sections 3173 nd 3211 of the Revised Statutes of Missouri, 1909, and section 2 of Article 12 of the Constitution of Missouri, 1875, and that aid sections are null and void and of no legal force and effect for he following reasons:

(a). Because said sections 3173 and 3211 of the Revised tatutes of Missouri, 1909, when enacted by the Legislature were assed in violation of Section 32 of Article 4 of the Constitution of lissouri, 1865, in this: that the title of said Act of 1872, now ections 3173 and 3211 of the Revised Statutes of Missouri, 1909, urports to prevent **unjust** discrimination in freight rates, where-s, the body of said Act prohibits discrimination of all kinds with-ut regard to whether the same is unjust or just and reasonable, nd the subject of said act is not therefore expressed in its title.

(b). Because said Sections 3173 and 3211 are repugnant to nd in violation of Section 14 of Article 12 of the Constitution of lissouri, 1875, in this: that said section of the Constitution of lissouri provides for the passage of laws to correct abuses and revent **unjust** discrimination and extortions in freight and pas-enger rates, and establishing reasonable maximum freight rates, whereas the body of said Act of 1872, now sections 3173 and 3211 f the Revised Statutes of Missouri, 1909, prohibits discrimina-ion of all kinds without regard to whether the same is unjust or ust and reasonable and fixes arbitrary, unfair and unreasonable naximum rates.

(c). Because said Sections 3173 and 3211 Revised Statutes of Missouri, 1909, when re-enacted by the Legislature in 1879, were not legally re-eneacted but were enacted in violation of Section 28 of Article 4 of the Constitution of Missouri, 1875, in this: that the title of said Act as passed makes the same appear to be an Act to prevent unjust discrimination, whereas, the body of said Act prohibits discrimination of all kinds without regard to whether the rates fixed are unjust or just and reasonable, and the subject of said Act is not therefore clearly expressed in its title.

(d). Because said Sections 3173 and 3211 of the Revised Statutes of Missouri 1909, were repealed by an Act of the Legislature passed in 1887 entitled, "An Act to Regulate Railroad Corporations," passed at the extra session of 1887, same being found in the Session Laws of 1887 at page 15, now Sections 3185 and 3193 of the Revised Statutes, 1909.

For further answer to said count, the defendant says that Section 12 of Article 12 of the Constitution of Missouri, 1875, and Sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Missouri, 1909, are in violation of Section 1 of Article 14 of the Amendments to the Constitution of the United States in this; that said Sections of the Constitution of Missouri and of the Revised Statutes of Missouri, deprive defendant of its property without due process of law and denies to it the equal protection of the laws.

"For further answer to said count, the defendant says that Sections 3173 and 3211 of the Revised Statutes of Missouri, 1909, are repugnant to and in violation of Article 5 of the Amendments to the Constitution of the United States in this: That said Sections deprive the defendant of its property without due process of law.

"For further answer to said count the defendant says that Sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Missouri, 1909, and Section 12 of Article 12 of the Constitution of Missouri, 1875, are in conflict with Section 8 of Article 1 of the Constitution of the United States and the various laws passed by Congress thereunder in this: That the said defendant is engaged in interstate commerce and owns and operates various lines of railroad as a part of its system which run int

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er states than Missouri and into the states of Kansas, Colo-
lo, Nebraska, Oklahoma, Illinois, Arkansas and Louisiana, and
t the trains in which the plaintiff's property described in said
mt was being transported were at the time engaged in inter-
te commerce and contained car load lots and shipments of mer-
ndise consigned and being carried from points without the
ate of Missouri to points within this state, and from points
thin this state to points without the same and from points
thout this state across the state of Missouri and to points in
her states, and that by reason of the premises this state is
thout jurisdiction to adopt and pass the sections herein named
d to enforce the provisions of the same against this defendant
hile so engaged in interstate commerce.

"For further answer to said count, the defendant says that
ctions 3173 and 3211 and Sections 3185 and 3193 of the Revised
tatutes of Missouri, 1909, and Section 12 of Article 12 of the
nstitution of Missouri, 1875, are in conflict with Section 8
Article 1 of the Constitution of the United States and the var-
us laws passed by Congress thereunder in this: that the de-
ndant's railroad is an interstate road and its lines extend over
nd through the states of Missouri, Kansas, Colorado, Nebraska,
linois, Oklahoma, Arkansas and Louisiana, and that it is en-
aged in interstate commerce over its said lines through all of
id states and operates trains over the same in transporting
reight and passengers through said States; that said section
f the Constitution of Missouri and Sections of the Revised
tatutes seek to compel the defendant arbitrarily to fix its rates
n this State and in all of said States and in comparison with rates
xisting in all such States without regard to the laws passed by
Congress regulating interstate commerce.

"Further answer to said count the defendant denies each
nd every allegation therein contained.

"Wherefore having fully answered defendant prays to go
ence with its costs."

(Printed record herein pp 29-30.)

In said Circuit Court defendant in error herein moved to
trike out said answer on the following grounds:

First: Said parts of said answer and the alleged defenses

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therein set forth are based upon an erroneous construction of said provisions of the State and Federal Constitutions, and upon an erroneous construction of the statutory provisions referred to in said answer.

Second: Said parts of said answer and defences, as pleaded, allege erroneous conclusions drawn from said Constitutional and statutory provisions referred to therein.

Third: They state no facts constituting any defense to the causes of action contained in the petition.

Fourth: They are improperly pleaded in the answed and can only be urged by demurrer to the petition.

To the action of the court in striking out said answer the plaintiff in error duly excepted and saved its exceptions.

(Printed record herein p. 23.)

The following are and were the provisions of constituional and statute law in force at all the times and dates named in the pleadings herein upon which said action is based:

MISSOURI CONSTITUTION

Article XII, Entitled "Corporations:"

"Sec. 5.—The exercise of the police power of the state shall "never be abridged, or so construed as to permit corporations to "conduct their business in such manner as to infringe the equal "rights of individual, or the general well-being of the state."

"Section 12.—Discrimination prohibited—commutation tick- "ets. It shall not be lawful in this state for any railroad company "to charge for freight or passengers a greater amount for the "transportation of the same, for a less distince than the amount "charged for any greater distance; and suitable laws shall be "passed by the General Assembly to enforce this provision; but "excursion and commutation tickets may be issued at special rates."

MISSOURI STATUTE (Act 1872)

"Section 3173.—No railroad corporation organized or doing "business in this state, under any act of incorporation or general "law of this state, now in force or which may be hereafter "enacted, shall directly or indirectly charge or collect, for the "transportation of goods, merchandise or property on its said road "for any distance any larger or greater amount, as toll or com-"pensation, than is charged or collected for the transportation of "similar quantities of the same class of goods, merchaandise or "property over a greater distance upon the same road, nor shall "such corporation charge different rates for receiving, handling "or delivering freight at different points on its road or roads "connected therewith, which it has a right to use, nor shall any "such railroad corporation charge or collect, for the transporta-"tion of goods, merchandise or property over any portion of its "road, a greater amount as toll or compensation than shall be "charged or collected by it for the transportation of somilar quan-"tities of the same class of goods, merchandise or property over "any other portion of its road of equal distance; and all such "rules, regulations or by-laws of any railroad corporation, as "fix, prescribe or establish any greater toll or compensation than is hereinbefore prescribed, are hereby declared to be void." (Act 1872.)

TITLE OF ACT OF 1872

The title to the act of 1872 is as follows: "An act to prevent unjust discrimination and extortion in the rates to be charged by the different railroads in this State for the transportation of freight on said roads."

STIPULATION OF FACTS

The only evidence offered in the case was the following stipulation of facts:

"It is hereby stipulated between the parties that the defendant's stations, the rates charged by the defendant, including those paid by the plaintiff, the amount of coal transported and the distances set out in the several counts of the petition are correctly stated therein.

"It is further stipulated that such coal was delivered by plaintiff to the defendant for shipment in the usual and ordinary way without any direction or request by plaintiff as to what particular trains the same was to be transported in and that the defendant received and transported the same in the usual and ordinary course of business, on the usual trains passing over its roads. It is further agreed that the trains in which the defendant hauled said cars of coal contained other cars and shipments consigned from points within this state to points without the same, from points without the same to points within this state and from points without this state through this state and to points in other states."

"L. L. SCOTT,
"H. C. CLARK,
"Attorneys for Defendant.

ALEXANDER GRAVES,
Attorney for Plaintiff.

(Printed record herein p. 20.)

Judgment was rendered in said court in favor of plaintiff on each of said counts in the petition for the amount therein claimed aggregating $16,504.19.

(Printed record herein pp. 6-11.)

After ineffective motion for a new trial, plaintiff in error appealed from said judgment to the Supreme Court of Missouri, and upon affirmance thereof by said court the plaintiff in error took this writ of error to said judgment of said Supreme Court.

Brief in Support of Motion for Affirmance

I.

Neither the Missouri law nor the shipments involved in this case affect interstate commerce.

All the shipments of coal involved in this case as appears by the record herein, especially the pleadings as set forth in the statement of the case, originated at Myrick, one of the stations of plaintiff in error in the state of Missouri and were destined to various other stations on the same railroad in the same state

nowhere crossing the Missouri state line in order to accomplish he transportation of a single car load. So that all the commerce nvolved was intra-state or domestic to Missouri, it having begun nd ended in Missouri.

The Statute and Constitution of Missouri upon which this ction is based is essentially the same as that law construed and pheld in Louisville & Nashville Railroad Company, Plantiff in Error vs Commonwealth of Kentucky, 183 U. S. 503.

This case was reviewed and approved in an exhaustive opinion by Justice Hughes in Simpson et al. vs Shepard (Minnesota Rate Cases) 230 U. S. 352.

II.

The stipulation as to facts, quoted in the statement and contained in the record contains all the evidence offered on the trial, and states: "that the defendant's stations, the rates charged by "the defendant, including those paid by the plaintiff, the amount "of coal transported and the distances set out in the several "counts of the petition are correctly stated therein. * * That the "trains in which the defendant hauled said cars of coal contained "other cars and shipments consigned from points within this "state, to points without the same, from points without the same "to points within this state, and from points without this state "through this state and to points in other states."

This could not have the effect to convert the traffic from local to interstate commerce. In Simpson vs Shepard 230 U. S. 381-382 the facts were that "in the case of each company, the movement "of interstate and local traffic takes place at the same time, on "the same rails, with the same employees, and largely by means "of the same trains and cars." Yet the court held this not to affect interstate commerce.

III.

The Missouri statute and constitution quoted in the statement, like the Kentucky statute and constitution, does not in terms embrace the case of interstate commerce. The pleadings in this case show that all traffic and all the comparative rates and

points and distances are confined within the boundary line
Missouri and that that line is nowhere crossed.

Justice Hughes, in Simpson vs Shepard, 230 U. S. 42
429, quoted with approval, from Louisville & Nashvi
Railroad Company vs Kentucky 183 U. S. 503. "It
"plain that the provision in question does not in terms embra
"the case of interstate traffic. It is restricted in its regulati
"to those who own or operate a railroad within the state, and t
"long and short distances mentioned are evidently distances up
"the railroad line within the state. The particular case befo
"us is one involving only the transportation of coal from o
"point in the state of Kentucky to another by a corporation
"that state. It may be that the enforcement of the state regu
"tion forbidding discrimination in rates in the case of artic
"of a like kind, carried for different distances over the sa
"line, may somewhat affect commerce generally; but we ha
"frequently held that such a result is too remote and indirect
"be regarded as an interference with interstate commerce; th
"the interference with the commercial power of the general g
"ernment to be unlawful must be direct, and not the merely in
"dental effect of enforcing the police power of a state."

IV.

In Wabash, etc. Railway Company vs Illinois 118 U. S. 5
565 this court in construing an Illinois statute, in substance id
tical with the Missouri statute, said: "If the Illinois stat
"could be construed to apply exclusively to contracts for a c
"riage which begins and ends within the state, disconnected fr
"a continuous transportation through or into other states, th
"does not seem to be any difficulty in holding it to be valid.
"instance, a contract might be made to carry goods for a cert
"price from Cairo to Chicago, or from Chicago to Alton.
"charges for these might be within the competency of the Illi
"Legislature to regulate. The reason for this is that both
"charge and the actual transportation in such cases are exc
"ively confined to the limits of the territory of the State, an
"not commerce among the States, or interstate commerce.
"is exclusively commerce within the state. So far, therefore
"this class of transportation, as an element of commerce, is

"fected by the statute under consideration, it is not subject to "the constitutional provision concerning commerce among the "States."

V.

XIVth Amendment

The Missouri Constitution and statute do not contravene the Fourteenth Amendment of the Constitution of the United States.

These provisions of law do not pretend to prescribe any rates whatever, but only prohibit discrimination in rates and is competent legislation for the state.

Louisville & N. R. Co. vs Kentucky, 183 U. S. 507-516.

Simpson vs Shepard, 230 U. S. 433-434.

Alabama & V. R. Co. vs Mississippi R. Commission, 203 U. S. 496-500.

VI.

Equal Protection of the Law

The constitution and statute of Missouri apply to plaintiff in error equally with every other railroad company in the state and the complaint that it is deprived of the equal protection of the law is groundless, we submit.

Missouri P. R. Co. vs Humes, 115 U. S. 512.

Louisville & N. R. Co. 183 U. S. 512-514. supra.

VII.

The parts stricken out of the railroad's answer were properly stricken out so far as it contained any federal question in view of the points and authorities hereinbefore cited; and so far as questions of the state constitution and statute law are concerned, the Supreme Court of the State has repeatedly decided on the same points against plaintiff in error.

McGrew Coal Company vs Missouri Pacific R. R. Co., (not yet officially reported.)

Idem printed record herein p. 43.

McGrew vs Missouri Pacific Ry Co. 258 Mo. 23.

Idem printed record herein p. 46.

McGrew vs Missouri Pacific Railway Co., 230 Mo. 496.

Idem printed record herein p. 48.

These decisions on questions of state law, are binding upon this court.

Alabama & V. R. Co. vs Railroad Com. 203 U. S. 496.

Even though this court doubts the correctness of the State Supreme Court decision.

Wabash etc. Railway Co. vs Illinois 118 U. S. 565.

It is the peculiar province and privilege of the state courts to construe their own statutes.

Commercial Bank vs Buckingham's Exec. 5 How. 343.

Respectfully submitted,

ALEXANDER GRAVES,

Counsel for Defendant in Error.

Appendix. Notice of the filing of the motion to affirm and copies of the motion and of this brief were served on counsel for plaintiff in error on the [illegible] day of [illegible] 1916.

Office Supreme Court, U. S.
FILED
MAY 15 1916
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error.

vs.

McGREW COAL COMPANY,
Defendant in Error.

No. 601 222

In Error to the Supreme Court of the State of Missouri

Reply Brief by Defendant in Error

ALEXANDER GRAVES,
Counsel for Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error.

vs.

McGREW COAL COMPANY,
Defendant in Error.

No. 601

In Error to the Supreme Court of the State of Missouri

Reply Brief by Defendant in Error

The brief of plaintiff in error consumes considerable space in setting forth the decisions of states other than that of Missouri and in quoting from the Public

Service Commission of that state and dissenting opinions of Missouri cases with which we do not deem it proper to burden this case, because it seems that such decisions and quotations are not authority in this court, and shed no light upon the points involved. This brief, on page 16, also cites many cases from this court which were cited by the plaintiff in error and considered by the court in Louisville & N. R. Co. vs. Kentucky and the doctrine therein, while not overruled was expressly declared not to be applicable to the case then under consideration and the judgment of the state court of Kentucky against the plaintiff in error was affirmed.

Louisville & N. R. Co. vs. Kentucky, 183 U. S. 511.

II.

The case of Penn. R. R. Co. vs. International Coal Co., 230 U. S. l. c. 197 is also cited and quoted from by plaintiff in error herein, but that case was wholly based upon the Federal Statute to regulate interstate commerce, whereas this action is based solely upon a legislative act of the State of Missouri expressly giving the defendant in error the right to sue for the breach of this legislative act of the State of Missouri and the Supreme Court of the State has very often construed this state law and has invariably sustained the view that the defendant in error was entitled to sue under that act for the excess of charges made by the carrier for transporting freight of the same class over a shorter than over a longer distance.

McGrew vs. Mo. Pac. Ry. Co., 177 Mo., l. c. 545.
McGrew vs. Mo. Pac. Ry. Co., 230 Mo., 496.
McGrew vs. Mo. Pac. Ry. Co., 258 Mo., 23.

McGrew vs. Mo. Pac. Ry. Co., (not yet officially reported.)

Cohn vs. Railroad, 181 Mo., 45, (last paragraph.)

III.

These decisions construing the state law and constitution will be followed by this court.

In Ala. & V. R. Co. vs. Railroad Com. 203 U. S. 501, this court said:

"In the present case we are not construing an act of the state of Mississippi or passing upon the powers which by it are given to the state railroad commission. These matters are settled by the decision of the Supreme Court of the state, and the question we have to consider is the power of the state to enforce an equality of local rates as between all parties shipping for the same distance over the same road. That a state has such power cannot be doubted and it cannot be thwarted by any action of a railroad company which does not involve an actual interstate shipment. * * * The state may insist upon equality as between all its citizens, and that equality cannot be defeated in respect to any local shipments by arrangements made with or to favor outside companies. We see no error in the ruling of the Supreme Court of the State of Mississippi and its judgment is affirmed."

IV.

The Missouri decisions are uniform and consistent on the questions involved, although for some undefined purpose plaintiff cites Sloan vs. Pacific Railroad, 61 Mo., 224 (should be p. 24.)

The Supreme Court of Missouri in the mass of this McGrew litigation has frequently pointed out the erroneous view of plaintiff in error concerning this Sloan case.

McGrew vs. Railroad, 230 Mo., 511-518.
McGrew vs. Railroad, 258 Mo., 23.

And the same may be said of C. & A. Railroad vs. People, 67 Ill. 11. cited by plaintiff in error.

McGrew vs. Railroad, 230 Mo., 511-518.

There was a dissenting opinion in McGrew vs. Railroad 230 Mo. **supra**, by Judge Woodson, quoted **in extenso** by plaintiff in error here, who afterwards concurred with the court in McGrew vs. Railroad 258 Mo., **supra.**

V.

The Missouri decisions herein cited by defendant in error have discussed and construed the Missouri constitution and statute upon which this suit is based in multiplied forms at the instance of plaintiff in error, defining the **meaning and effect of said provisions** of said state law in all its phases, between these parties to this suit, including particularly the right of defendant in error to sue and recover in these suits upon the same pleadings and proof set forth in the "statement of case" by defendant in error herein. These decisions are authoratative and binding on this court in this case.

Louisville & N. R. Co. vs. Kentucky 183 U. S. pp. 507-511.

Commercial Bank vs. Buckingham's Exec. 5 How. 343.

Alabama & V. R. Co. vs. Railroad Com. 203 U. S. 496.

Wabash etc. Railway Co. vs. Ill. 118 U. S. 565.

VI.

The enforcement of the Missouri constitution and statute upon which this suit is based would and could have no direct and appreciable effect upon interstate commerce.

Simpson vs. Shepard, 230 U. S. 352, and other authorities cited in the brief in chief by defendant in error.

VII.

The Missouri statute (section 3211) unlike the statutes involved in the cases cited in the last point of the brief for plaintiff in error, does not fix a specific amount (neither more nor less) as a penalty for its breach.

The Missouri statute leaves the amount to be recovered to the discretion of the triers of fact on the evidence, **in no event to exceed $1,000.** This is not liquidated damages fixed by the statute. The stipulation quoted in briefs for both sides states: "That the defendant's stations, **the rates charged by the defendant, including those paid by the plaintiff,** the amount of coal transported, and the distances set out in the several counts of the petition are correctly stated therein." In connection with this statement of facts we request the court to peruse the first count of the petition set forth by the "statement of case" made by both sides.

Brief for plaintiff in error pp. 2, 3.

Brief for defendant in error pp. 2, 3.

This stipulation is an admission of every fact that the plaintiff would be required to prove in order to recover under said law upon the first or any other of the forty-sevn counts in the petition, as the said law

has always heretofore been construed by the Supreme Court of the State of Missouri in the multitude of cases hereinbefore cited.

ALEXANDER GRAVES,
Counsel for Defendant in Error.

Office Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

October Term, 1916

No. 222

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

McGREW COAL COMPANY,

REJOINDER BY DEFENDANT IN ERROR TO REPLY BRIEF OF PLAINTIFF IN ERROR.

EDWIN A. KRAUTHOFF,
Attorney for Defendant in Error.

ALEXANDER GRAVES,
S. McCLINTOCK,
ARTHUR L. QUANT,
MAURICE McNEILL,
of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1916

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
McGREW COAL COMPANY.

No. 222

REJOINDER BY DEFENDANT IN ERROR TO REPLY BRIEF OF PLAINTIFF IN ERROR

In this case the carrier, defendant in the trial court, plaintiff in error in this Court, has filed a reply brief which is open to the criticism:

(*a*) Points are urged not raised in the original brief.

"Points raised by appellant or plaintiff in error in his reply brief which were not presented in the opening brief will not as a general rule be considered."

2 Cyc., 1018, and *cas. cit.* note 92;
3 Corpus Juris, p. 1434, and *cas. cit.* note 32;

(*b*) Reference is made to matters not arising on the record in this case.

"As a matter of course, the supreme court (of a state) cannot look outside of the record before it."

2 Hayne on New Trial and Appeal, sec. 283, p. 1565.

"* * * on appeal or writ of error to this court, papers or documents used at the hearing in the court below cannot in strictness be examined here unless they are made part of the record by bill of exceptions or in some other proper mode."

Bassing v. Cady, 208 U. S., 386, 389.
Metropolitan Railroad Co. v. District of Columbia, 195 U. S., 322, 329.
United States *ex rel.* Kinney v. U. S. Fidelity & Guaranty Co., 222 U. S., 283.
1 Digest U. S. Sup. Ct. Reports (Law Coop. Pub. Co.), p. 509.

"It has been repeatedly ruled in this court, that we can look only to the record to ascertain what was decided in the court below."

Davis v. Packard, 7 Peters, 276, 282.

I

At the outset of the reply brief, the plaintiff in error, it is asserted (pp. 1, 2) "that the construction of a state statute by the highest court of the State is not controlling on this Court, where the statute itself or the interpretation placed upon it, results in depriving a citizen of his property in violation of the Fourteenth Amendment to the Federal Constitution." The true rule is:

(*a*) This Court accepts the interpretation of the state court as to the correct meaning of the state constitution or statute.

(*b*) This Court then determines whether as thus interpreted, the constitutional or statutory provision in question is violative of the Fourteenth Amendment to the Federal Constitution.

The Supreme Court of Missouri has held the constitutional provision of that State: It shall not be lawful in this State for any railroad company to charge for freight

or passengers, a greater amount for the transportation of the same for a less distance than the amount charged for any greater distance (Const. of Missouri, Art. 12, Sec. 12), to be self-enforcing and creative of a cause of action in favor of the shipper for the excess rate paid, as overcharge, not as a penalty or damage. This excludes the statute complained of from this case.

McGrew v. Missouri Pacific Ry. Co., 230 Mo., 496, 546.

The case cited became the basis of McGrew Coal Co. v. Railroad, 258 Mo. 23, Rec., pp. 46-48, which in turn became the basis of the opinion of the state court in the case at bar. Rec., p. 43.

In the reply brief of the plaintiff in error, page 2, the case of White v. Delano (Supreme Court of Missouri) 191 S. W., 1012, 1016, is cited. That case is an aftermath of The Missouri Rate Cases, 230 U. S., 510. A statute had been enacted in Missouri establishing a maximum freight rate. In that statute, there was no provision for a judicial review as to whether the rate was compensatory or confiscatory. The statute provided for the recovery of treble the amount of the excess rate charged. The enforcement of the statute was enjoined in a district court of the United States. The injunction so granted was dissolved by the Supreme Court of the United States. Pending the injunction, excessive freight rates had been collected by Wabash Railroad Company, and thereafter, Wabash Railroad Company was placed in the hands of receivers. The case of White v. Delano was an action to recover of the receivers the excess freight rates charged during the pendency of the injunction. In the trial court the plaintiff recovered treble damages. On appeal, the Supreme Court of Missouri held that the enforcement of the penalty clause of that law was suspended pending the injunction, and that plaintiff could not recover treble damages; but the Supreme Court of Missouri did direct "the circuit court to

enter judgment for the plaintiff *for the actual excessive charges made and collected from plaintiff.*"

In the case of White v. Delano, the rates in question were the result of a legislative fiat. In the case at bar, the greater rate charged for the lesser distance, is the act of the carrier. In White v. Delano, the carrier was afforded no opportunity to have determined the reasonableness of the rate fixed by the legislature. In the case at bar, the carrier itself fixed the rate.

At page 3 of the reply brief, plaintiff in error undertakes to analyze and characterize the petition of the shipper.

But the Supreme Court of Missouri in the case at bar (Rec., p. 43) has said: "Each count of the petition is in legal effect identical with the counts of the petition in McGrew v. Railroad, 258 Mo., 23, and with those in the cases between the same parties cited in the opinion in that case. Ibid., l. c. 25, differing only in amounts, dates and destination of shipments, and in distances used for purposes of comparison."

That is to say, the Supreme Court of Missouri has ruled, a petition identical in form with the petition in the case at bar was sufficient to support a judgment for excessive freight rates collected in violation of a self-enforcing constitutional provision of that State.

Indeed in that State, it is provided by statute:

I Rev. Stat., Mo., 1909, Sec. 1727: "There shall be in this State but one form of action for the enforcement or protection of private rights, and redress or prevention of private wrongs, which shall be denominated a civil action; * * *"

Construed in Ackerman v. Green, 195 Mo., 124, 140 and *cas. cit.*

"Rulings of the state court with respect to the sufficiency of an indictment, present no federal question."

Cases cited note 29, 1 Enc. U. S. Sup. Ct. Reports, p. 635.

The following decisions of state courts have been held not to raise federal questions:

Estoppel, waiver, *res adjudicata*, statute of limitations, state procedure, and matters of general law and of local law not involving constitutional law.

4 Fed. Stat. Ann., pp. 488 *et seq.*
2 Fed. Stat. Ann. Supp., 1912, pp. 1396 *et seq.*

It is claimed in the reply brief of plaintiff in error (p. 4): "the answer of the railway company further averred that plaintiff was prosecuting its suit under the provisions of Sections 3173 and 3211, Revised Statutes of Missouri, 1909." The motion to strike out this portion of the answer is in effect a demurrer thereto.

"When used for the purpose of striking out a pleading or a portion thereof, a motion is governed by the rules concerning demurrers."

Paddock v. Somes, 102 Mo. 226, 235.

A demurrer does not admit a conclusion of law of the adverse pleader.

Pattison Missouri Code Pleading (2d. Ed.), Sec 926.

II

Plaintiff in error contends (reply brief, p. 6) that on each of four counts of the petition filed in the state court, the recovery of the plaintiff was in excess of the maximum amount fixed by the statute, $1,000.

In considering this, it will be recalled:

(*a*) The shipper did not recover on the statute limiting his recovery to $1,000.00. The shipper recovered as for an overcharge, the excessive freight rate exacted by the carrier.

(*b*) Whether the recovery in the state court was in excess of the maximum fixed by a valid statute does not

present a Federal question reviewable on writ of error in this Court.

(*c*) None of the counts specified (42, 45, 46, 47, Brief of Plaintiff in Error, p. 6) are set out in the record. (Rec. pp. 12-18.)

(*d*) The documents hereto attached and the exhibit on file in this Court show that each of these so-called excessive counts are based on a number of shipments, made on separate dates, and that the freight paid on none of these separate shipments aggregates $1,000.

(*e*) Neither in the motion for new trial (Rec. pp. 25-27) nor in the motion in arrest (p. 27) is any allegation of a recovery of excessive damages.

"As defendants made no complaint of excessive damages in their motion for new trial, that question cannot be considered open for examination now. Ridenhour v. Railroad (1890) 102 Mo., 270."

Blanton v. Dold, 109 Mo., 64, 69.
Weese v. Brown, 102 Mo., 299, 304.
State *ex. rel* v. Farmers & Merchants Nat. Bk., 144 Mo., 381, 386, 387.
Turney v. Baker, 103 Mo. App., 390, 397.
McNichols v. Nelson, 45 Mo. App., 446, 455.

(*f*) No allegation of excessive recovery is found in the assignment of errors in the case at bar. (Rec. pp. 113, 114.)

2 Enc. Sup. Ct. Rep., p. 263.
1 Digest Sup. Ct. Reports (Law Coop. Pub. Co.), p. 543.

III

At pp. 8 *et seq.* of the reply brief of the plaintiff in error are found some statements of fact and maps neither pleaded or proved. It is stated in the brief *as a fact* (though neither

pleaded nor proved): "Liberal is in Barton County, and the transportation from that point would be in a southwesterly direction to Pittsburg, in the State of Kansas, and from there to Asbury in Missouri, and then by defendants line, probably to Carthage and Webb City, and from thence in a southerly direction to Granby." (Reply Brief, p. 9.) The map (p. 11) shows it is possible to go from Liberal to Granby by traveling entirely in Missouri.

In this connection as to interstate commerce for the information of the Court, the following cases are cited:

Hanley v. Kansas City Southern Railway Company, 187 U. S., 617.

Hardwick Farmers Elevator Co. v. Chicago, Rock Island & Pacific Railway Company, 110 Minn., 25, 19 Ann. Cas., 1088.

Mires v. St. Louis, etc., Railroad Co., 134 Mo. App., 379, 388, 389.

Missouri, etc., Ry. Co. v. Leibengood, 28 L. R. A. (N. S.) 984 and note.

Traynham v. Railway Co., 92 S. C., 43.

As to judicial notice, the following:

"The court could not take judicial notice of the location of the Denver Tramway Company."

Ingersoll v. Davis, 14 Wyo., 120, 127.

"We know judicially, that the appellants road (a railroad) passes in and through Kosciusko County."

Baltimore & Ohio R. R. Co. v. Brant, 132 Ind., 37, 38.

(Syllabus) "The courts will take judicial notice of the respective locations of railroads between a point in the state to a point in another state."

Texas & N. O. Ry. Co. v. Walker (Tex. Civ. App.) 95 S. W. Rep., 743.

(Syllabus) "The appellate court will take judicial notice that a certain town is in a certain county."

Johnson v. Hutchison, 81 Mo. App., 299, 304.

" * * * this court will take judicial cognizance that a shipment from Myrick to Kansas City was not in the same direction that the shipment from Myrick to Boonville was, but was in fact in an opposite direction."

McGrew v. Mo. Pac. Ry. Co., 177 Mo., 533, 541, 542.

"Now we will take judicial notice that Moniteau county is one of the counties of this state * * * (and) that California is a town situate in Moniteau county."

State v. Pennington, 124 Mo., 388, 391, 392.

(Syllabus) "Judicial notice will be taken of the relative geographical location of a city in New York and one in New Jersey, and of the time of railroad travel and for the transportation of mails between them."

Williams v. Brown, 65 N. Y. Supp., 1049, 1050.

(Syllabus) The courts will take judicial notice that a town of several hundred inhabitants on a railroad, having express and post offices is located in a certain county.

St. Louis, etc., Ry. Co. v. Magness, 68 Ark., 289.
See also Gulf, etc., Ry. Co. v. State, 72 Tex., 404, 13 Am. St., 815, note p. 823.
See extra-annotation to case reported 1 L. R. A., 849, annotation to be found in supplement at p. 204.

"It is contended that the court will take judicial notice of the acts of Congress and that this is an odd-numbered section; but it is urged that the court cannot take judicial

notice of when and where the railway line of the Atchison, Topeka & Santa Fe Railroad Company was definitely located, or whether this particular odd-numbered section lies within the limits of that grant and of such location. We are unable to agree with defendant upon this proposition. In the case of G. C. & S. F. Ry. Co. v. The State, 72 Tex., 404, 10 S. W., 81, 1L. R. A., 849, 13 Am. St. Rep., 815, it was said:

"'But the authorities cited show that we must take notice of the geography of the State, and at least of its navigable streams. It is a matter of history that important lines of railroads once established have remained as fixed and as permanent in their course as the rivers themselves. They supersede in the main all other modes of travel between the points which they touch and become as well if not better known than any other geographical features of the country. Their locality becomes 'notorious and indisputable.' (Page 410.)

"'In volume 1 of Wharton on the Law of Evidence, Section 339, it is said:

"'A court is bound to take judicial notice of the leading geographical features of the land, the minuteness of the knowledge so expected being in inverse proportion to distance.' (See also *Peyroux and others v. Howard and Varmon*, 32 U. S., 324, 8 L. Ed., 700; 17 A. & E. Encycl. of L., 944.)"

74 Kan., 226, 229, 230, L. P. Worden *et al.*, as Partners, etc., v. Lydia A. Cole.

As to the counts in the petition which are predicated of the lower rate charged for a greater distance, that is from Liberal to Granby, the petition, (Rec., pp. 13, 14) charges the collection of the greater rate from plaintiff for the shorter distance. The answer charges that the petition is founded upon two sections of the Revised Statutes of Missouri, 1909, being Sections 3173 and 3211, and then challenges the validity of these sections on various grounds, not presenting a Federal question. The answer continues (pp. 19, 20):

"For further answer to said count the defendant says that Sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Missouri, 1909, and Section 12 of Article 12 of the Constitution of Missouri, 1875, are in conflict with Section 8 of Article 1 of the Constitution of the United States and the various laws passed by Congress thereunder in this: That the said defendant is engaged in interstate commerce and owns and operates various lines of railroad as a part of its system which run into other states than Missouri and into the states of Kansas, Colorado, Nebraska, Oklahoma, Illinois, Arkansas and Louisiana, and that the train in which the plaintiff's property described in said count was being transported was at the time engaged in interstate commerce and contained car load lots and shipments of merchandise consigned and being carried from points without the State of Missouri to points within this state, and from points within this state to points wihout the same and from points without this state across the state of Missouri and to points in other states, and that by reason of the premises this state is without juirsdiction to adopt and pass the sections herein named and to enforce the provisions of the same against this defendant while so engaged in interstate commerce.

"For further answer to said count, the defendant says that Sections 3173 and 3211 and Sections 3185 and 3193 of the Revised Statutes of Missouri, 1909, and Section 12 of Article 12 of the Constitution of Missouri, 1875, are in conflict with Section 8 of Article 1 of the Constitution of the United States and the various laws passed by Congress thereunder in this: that the defendant's railroad is an interstate road and its lines extend over and through the States of Missouri, Kansas, Colorado, Nebraska, Illinois, Oklahoma, Arkansas and Louisiana, and that it is engaged in interstate commerce over its said lines through all of said states and operates trains over the same in transporting freight and passengers through said States; that said section of the Constitution of Missouri and Sections of the Revised Statutes seek to compel the defendant arbitrarily to fix its rates in this State and in all of said States and in comparison with rates existing in all such States without regard to the laws passed by Congress regulating interstate commerce.

"For further answer to said count the defendant denies each and every allegation therein contained.

"Wherefore having fully answered defendant prays to go hence with its costs."

It has been ruled:

"To become the basis of a proceeding in error from this court to the Supreme Court of a State 'a right, privilege or immunity' claimed under a statute of the United States must be 'specially set up or claimed,' and must be denied by the state court. Rev. Stats., §709; Judicial Code, §237. This means that the claim must be asserted at the proper time and in the proper manner by pleading, motion or other appropriate action under the state system of pleading and practice. Mutual Life Insurance Co. v. McGrew, 188 U. S., 291, 308 * * * ."

Atlantic Coast Line R. R. Co. v. Mims, 242 U. S., 532, 535.

The answer of the carrier in the trial court does not plead that in carrying coal from Liberal, Missouri, to Granby, Missouri, the coal was hauled from Liberal in the State of Missouri to Pittsburg, in the State of Kansas, (See map, reply brief, p. 11) and thence back into Missouri, eventually reaching Granby, Missouri. As to the facts pleaded in the petition, the answer is a general denial thereof.

In the assignments of error (assignment No. 4, Rec., pp. 113, 114) the language already quoted from the answer is repeated.

According to the map (reply brief, p. 11) the coal hauled for the greater distance at the lesser rate, may have been transported from Liberal to Granby entirely in Missouri.

But this Court on this writ of error is asked to take judicial notice that as to the particular coal in question, the same was hauled by defendant carrier from Liberal, Missouri, to Pittsburg, Kansas, thence by defendant carrier over the line of Kansas City Southern Railway Company to Asbury, Missouri, thence to Granby.

An eminent authority has stated the rule:

"Before a liability will result for an injury on a railroad, the evidence of the plaintiff must show either ownership of the place or appliance causing the injury by the defendant, or such control or authority over the same as would render the defendant responsible for the condition causing the injury."

1 White, Personal Injuries on Railroads, sec. 77.

"The plaintiff has the burden of proof that the defendant railroad company owned or operated the railroad on which his injuries were received where that is made an issue by the pleadings."

4 Elliott on Railroads, (2d Ed.) sec. 1777.

But no case is cited, and it is submitted none can be found, to the effect this Court will take judicial notice of the fact that a railroad company, having a line all its own, extending from a point in Missouri to another point in Missouri, and situate entirely in Missouri, would haul coal to a point on its line in Kansas, and then over another railroad over which it is said to have an operating lease (neither pleaded nor proved) and then back in Missouri. In the case at bar, the petition was filed returnable to the February term, 1912, of the circuit court of Lafayette County, Missouri (Rec., p. 12). It pleaded, the acts complained of happened "within five years last past." (Rec., p. 13.)

In Intermountain Rate Cases, 234 U. S., 476, it is pointed out that prior to the amendment of June 18, 1910, an interstate carrier had the right "to exercise a primary judgment * * * concerning the necessity and propriety of making a lower rate for the longer than the shorter haul." (Syllabus.)

By the amendment of June 18, 1910, the rule was materially changed. Viewed as a Federal question, it can not be told from the record in the case how many of the shipments complained of arose before June 18, 1910, and how many after that date.

IV

In the reply brief (pp. 13, 14) we are met with this gratuitous assumption of an unpleaded and unproved fact: "If the coal company paid the freight on the coal transported, the amount thereof was added to the selling price to the purchaser."

The petition alleges the coal company did pay the excessive freight charged. (Rec., pp. 13, 14). The carrier received the excessive freight charged the shipper.

One guilty of a wrong may never defend on the ground the person wronged has been compensated from other sources.

> Mathews v. St. Louis, etc., Ry. Co., 121 Mo., 298, 336.
> Matthews v. Mo. Pac. Ry. Co., 142 Mo., 645, 659.

"There can be no abatement of damages on the ground of partial compensation when it comes from a collateral source independent of defendant."

> Williams v. St. Louis, etc., Ry. Co., 123 Mo., 573, 585.
> Hartford Fire Ins. Co. v. Wabash Railway Company, 74 Mo. App., 106, 113.
> 1 Sutherland on Damages (4th Ed.), sec. 158 and *cas. cit.*
> Chicago, etc., Railroad Co. v. Pullman Car Co., 139 U. S., 79, 86 *et seq.*
> The Propellor Monticello v. Mollison, 17 How., 152.

The intimation (Reply Brief, p. 13): "if the coal company did not pay the freight, but the freight charges were paid by the purchaser, then," etc., falls when we are reminded the petition alleges that defendant carrier "charged and demanded, and received *of the plaintiff* eighty cents per ton." (Rec., p. 13.)

The stipulation admits McGrew Coal Company paid the freight. (Rec., p. 35.)

Whether McGrew Coal Company is or is not the party aggrieved by the illegal act of defendant carrier, is not a Federal question.

V

At page 16 of the reply brief, we are again confronted with an unpleaded and unproved allegation: "* * * the Pacific Railroad Company of Missouri, *to whose charter rights plaintiff in error has succeeded*, was incorporated by an act of the Legislature of the State in the year 1849 (Acts of 1849, p. 219)."

No such defence is pleaded in the answer. (Rec., pp. 18-20.) No evidence of such fact was offered. (Rec., p. 36.)

"The general rule is that private statutes of a state, as distinguished from public statutes are not judicially noticed either by its own courts, or by any other courts, in the absence of constitutional or statutory requirement to the contrary * * * The rule applies of course in the absence of a statute to the contrary to private acts creating or relating to private corporations."

16 Cyc., 896, 897.

"* * * private laws * * * are matters of fact, to be proved as such in the ordinary manner."

Leland v. Wilkinson, 6 Peters, 317, 322.

"The statute creating the corporation is a private one and must be given in evidence. The act making the printed statute book evidence of private statutes does not dispense with the requirement of the common law that they must be produced in evidence."

Bailey v. Trustees, 12 Mo., 174, 177.
Inhabitants v. Robinson, 75 Mo., 192, 194.
Kirby v. Wabash Ry. Co., 75 Mo. App., 345, 348.

"A special or private act is a statute operating only on particular persons and private concerns."

36 Cyc., 986.

There is nothing in the act in question (Laws of Missouri, 1849, pp. 219 *et seq.*) making it an act of a public nature—indeed it is classified in the statute book under "acts of a private nature" (Laws of Missouri, 1849, p. 133).

Section 12 of the act (p. 211) required the road to be constructed in ten years. Was it so constructed? As an historical fact, it was not.

But the act of incorporation of Pacific Railroad Company in the year 1849 does not disable the people of Missouri from an exercise of a phase of the police power, the prevention of discrimination by railroad companies.

Chicago, etc., R. R. Co. v. Tranbarger, 238 U. S., 67, 74 *et seq.*

The Missouri Pacific Railway Company was a party to the Missouri Rate Cases, 230 U. S., 474, 509. No one had the hardihood to contend in that case that the charter granted Pacific Railway Company in 1849, authorized Missouri Pacific Railway Company to violate a rate statute of Missouri enacted in 1907.

The case of Atlantic & Pacific R. R. Co. v. City of St. Louis, 66 Mo., 228, refers to the building of a track in a public highway, not to the exaction of discriminatory freight rates.

The charter granted to Pacific Railway Company in 1849 does not exempt The Missouri Pacific Railway Company from the exercise of the police power of Missouri.

Georgia Railroad & Banking Co. v. Smith, 128 U. S., 174.

Minneapolis, etc., Ry. Co. v. Emmons, 149 U. S., 364, 367, 368.

In Pullman's Palace Car Co. v. Missouri Pacific Ry. Co., 115 U. S., 587, it is stated the railway company was formed in 1880 through the process of consolidation—Prior thereto in 1877, Missouri Pacific Railway Company was a corporation—of the 1880 corporation, this Court said:

"The present Missouri Pacific Company is a different corporation from that which contracted with the Pullman Company. The original company owned and operated a railroad between St. Louis and Kansas City. This company owns and operates that road and others besides. *It is a new corporation created by the dissolution of several old ones*, and the establishment of this in their place. It has new powers, *new franchises*, and new stockholders." (115 U. S., 594.)

"It has been frequently decided by this court that a special statutory exemption or privilege, such as immunity from taxation *or a right to fix and determine rates of fare*, does not accompany the property in its transfer to a purchaser, in the absence of express direction to that effect in the Statute."

St. Louis, etc., Ry. Co. v. Gill, 156 U. S., 649, 656.
Rochester Railway Co. v. Rochester, 205 U. S., 236, 247.
Norfolk, etc., R. R. Co. v. Pendleton, 156 U. S., 667.
Milwaukee Elec. Ry. Co. v. Wisconsin R. R. Commn., 238 U. S., 174.

VI

At page 23 of the reply brief, a curious confusion of thought is manifested—It is there claimed a recovery by a shipper under a state statute, applying only to shipments within a State, of an excessive rate charged operates as a preference under a federal statute.

If the shipper in this case recovers an excessive illegal freight rate, that does not operate as a preference in favor of that particular shipper, for under the law, other shippers similarly situate are free to do the same.

VII

At page 24 of the reply brief, the shipper is charged "with changing the theory upon which it proceeded in the trial court and in the Supreme Court of the State."

"Where the trial court's decision is correct, it will not be reversed because a wrong reason was given."

2 Dec. Dig., p. 51, sec. 854 (2).

"The question before an appellate court is, was the *judgment* correct, not the *ground* on which the judgment professes to proceed."

McClung v. Silliman, 6 Wheat., 598, 603.

VIII

"As to the penalties it suffices to say that in this case a recovery of penalties is not asked and consequently the subject may well be postponed until it actually arises for decision."

Wilson v. New ———— Sup. Ct. ————, decided by this Court, March 19, 1917, and *cas. cit.*

In Dwyer v. Gulf, etc., R. Co., 75 Tex., 572, 7 L. R. A., 478, 16 Am. St. Rep., 826, a statute making a carrier who refused to deliver freight on payment or tender of the charges due, "liable in damages to the owner of said freight * * * to an amount equal to the amount of the freight charges for every day said freight * * * is held after payment or tender of payment of the charges due as shown by the bill of lading" was held valid.

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MAURICE McNEILL,
of Counsel.

IN THE

Supreme Court of the United States.

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
McGREW COAL COMPANY,
Defendant in Error.
No. 222

AFFIDAVIT OF EDWARD J. M'GREW.

STATE OF MISSOURI, }
County of Jackson, } *ss:*

EDWARD J. McGREW, being duly sworn, upon his oath states that at the time of the institution of the action in the case at bar, on December 27, 1911, he was an executive officer of McGrew Coal Company, and prepared the data upon which the several counts of the petition in the case at bar are based.

Referring to the 42nd count in the petition, this affiant states that said count relates to coal shipped by McGrew Coal Company from Myrick, Missouri, to Holden, Missouri, and at the institution of the action, an exhibit was prepared, a letter press copy of which is in the possession of this affiant; that from this letter press copy it appears that at various dates, commencing with June 13, 1908, and ending November 29, 1911, coal was shipped in carload lots by McGrew Coal Company from Myrick, Missouri, to Holden, Missouri, aggregating a total tonnage of 5,971,400 pounds; that on none of the separate shipments on separate days included in said shipments, amounting to 81 cars in all, did the total freight amount to $1,000, the average freight on each car amounting to approximately $34, and on no one day during the period of time hereinbefore mentioned was more than one car shipped.

This affiant further states that on none of the cars shipped included in said total of 81 cars, was the total freight in excess of $42.50.

Referring to the 45th cause of action set out in the petition herein, this affiant states that this relates to the shipment of coal from Myrick, Missouri, to Boonville, Missouri, and that a similar exhibit was prepared with respect to this count in the petition, as hereinbefore stated, and the letter press copy of this exhibit in the possession of this affiant discloses that, beginning June 10, 1908, and ending December 14, 1911, McGrew Coal Company shipped from Myrick, Missouri, to Boonville, Missouri, the total of 356 cars of coal; that on none of the separate days on which were shipped the cars aggregating 356 cars from Myrick, Missouri, to Boonville, Missouri, were more than four cars shipped on any one day; that the maximum weight of any of the cars included in said total of 356 cars was 102,500 pounds, which, at a rate of 65 cents per ton, would make the maximum freight on said car of 102,500 pounds, $33.28, which, multiplied by four, makes a total of $133.12, which is the highest amount of freight paid in any one day in said period by McGrew Coal Company, for the shipment of coal from Myrick, Missouri, to Boonville, Missouri.

With respect to the 46th count in the petition, this affant says this refers to coal shipped from Myrick, Missouri, to Sedalia, Missouri; that commencing with June 12, 1908, and ending December 15, 1911, McGrew Coal Company shipped from Myrick, Missouri, to Sedalia, Missouri, over the Missouri Pacific Railway Company, an aggregate of 741 cars of coal; that the highest number of cars of coal shipped by McGrew Coal Company as aforesaid on any one day during said period, did not exceed seven in number; that the maximum tonnage in any of said cars was 108,600 pounds, which, at 65 cents per ton, amounts to $35.56, which for seven cars, makes a total of $248.92.

With respect to the 47th cause of action pleaded in the petition, this refers to coal shipped from Myrick, Missouri, to Kansas City, Missouri; that at various dates, beginning with June 6, 1908, and ending May 12, 1911, McGrew Coal

Company shipped from Myrick, Missouri, to Kansas City, Missouri, over the Missouri Pacific Railway Company, a total of 733 cars, at varying dates; that the highest number of cars shipped during said period on any one day did not exceed twelve; that the maximum weight of coal shipped in any of the cars included in said total, is 106,450 pounds, which, at 55 cents per ton, makes a total freight on said car, $29.27, which multiplied by twelve, makes $351.24, being the highest amount of freight paid by McGrew Coal Company on any one day for shipping coal from Myrick, Missouri, to Kansas City, Missouri; that at the institution of this action, there was filed with the petition in this case exhibits showing the details of all of said shipments; that is to say, the date of the shipment, the car number, the name of the railway company owning the car, the consignee, the destination, and the weight; that this affiant has gone to the office of the Circuit Clerk of Lafayette County, Missouri, and cannot find the exhibits in the office, but was advised by a former Circuit Clerk that the original of said exhibits were in the possession of counsel for the Missouri Pacific Railway Company, and this affiant has asked said counsel to return said exhibits to the office of the Clerk of the Circuit Court of Lafayette County, Missouri; that this affiant attaches to and makes a part of his affidavit, the letter press copies of the exhibits hereinbefore referred to.

EDWARD J. McGREW.

Subscribed and sworn to before me this 18th day of April, 1917.

[SEAL]

GEORGIE WILLIAMS SNYDER,
Notary Public in and for Jackson County, State of Missouri.

Extracts from Petition

Plaintiff for 42nd cause of action avers that on October, 1879, the defendant was and has ever since been a railroad corporation duly organized under the law of said State and a common carrier for hire of freight and passengers between its Stations hereinafter named in said State.

That within five years last past and on the dates hereinafter named plaintiff produced and sold bituminous coal from its own mines near Myrick, one of defendant's Stations in said County, and that on the various dates named in Exhibit No. 42 and in the cars therein described by Number and Initial it shipped by defendant's road from said Myrick in the aggregate 5,971,400 pounds of its said coal in car load lots to the consignees named in said exhibit at Holden, another station on defendant's road.

Plaintiff avers that for the said carriage of said coal defendant fixed, charged, demanded and received of the plaintiff 85 cents per ton, an illegal freight rate, being 35 cents per ton more than defendant was by law entitled to fix, demand, charge and receive, in this, that during all said times and dates herein named defendant had fixed, charged, demanded and received for the carriage of the same class of coal over its said line and over another part of its said road from its Station of Liberal and to another of its said Stations, viz., Granby, in said State, a distance of 77.14 miles, 50 cents per ton by the car load, while the distance from said Myrick to said Holden was only 72.05 miles for which said rate of 85 cents per ton for said carriage was fixed, charged, demanded and received of plaintiff as aforesaid; and the same was illegal and exceeded the amount the defendant was entitled to fix, charge, demand and receive for said shipments by the sum of $1,044 and 99 cents.

And the plaintiff avers that it is damaged and aggrieved by reason of said illegal freight charge in the sum of $1,044

and 99 cents; wherefore, it prays judgment for the same.

Plaintiff for 45th cause of action avers that on October, 1879, the defendant was and has ever since been a railroad corporation duly organized under the law of said State and a common carrier for hire of freight and passengers between its Stations hereinafter named in said State.

That within five years last past and on the dates hereinafter named plaintiff produced and sold bituminous coal from its own mines near Myrick, one of defendant's Stations in said County, and that on the various dates named in Exhibit No. 45 and in the cars therein described by Number and Initial it shipped by defendant's road from said Myrick in the aggregate 27,106,600 pounds of its said coal in car load lots to the consignees named in said exhibit at Boonville, another station on defendant's road.

Plaintiff avers that for the said carriage of said coal defendant fixed, charged, demanded and received of the plaintiff 65 cents per ton, an illegal freight rate, being 15 cents per ton more than defendant was by law entitled to fix, demand, charge and receive, in this, that during all said times and dates herein named defendant had fixed, charged, demanded and received for the carriage of the same class of coal over its said line and over another part of its said road from its Station of Liberal and to another of its said Stations, viz., Granby, in said State, a distance of 77.14 miles, 50 cents per ton by the car load, while the distance from said Myrick to said Boonville was only 76.71 miles for which said rate of 65 cents per ton for said carriage was fixed, charged, demanded and received of plaintiff as aforesaid; and the same was illegal and exceeded the amount the defendant was entitled to fix, charge, demand and receive for said shipments by the sum of $2,032 and 99 cents.

And the plaintiff avers that it is damaged and aggrieved by reason of said illegal freight charge in the sum of $2,032 and 99 cents: Wherefore, it prays judgment for the same and for said damages not exceeding $1,000 and for all other and general relief according to the Statute in such case made and provided.

Plaintiff for 46th cause of action avers that on October, 1879, the defendant was and has ever since been a railroad corporation duly organized under the law of said State and a common carrier for hire of freight and passengers between its stations hereinafter named in said State.

That within five years last past and on the dates hereinafter named plaintiff produced and sold bituminous coal from its own mines near Myrick, one of defendant's Stations in said County, and that on the various dates named in Exhibit No. 46, and in the cars therein described by Number and Initial it shipped by defendant's road from said Myrick in the aggregate 57,560,000 pounds of its said coal in car load lots to the consignees named in said exhibit at Sedalia, another station on defendant's road.

Plaintiff avers that for the said carriage of said coal defendant fixed, charged, demanded and received of the plaintiff 65 cents per ton, an illegal freight rate, being 15 cents per ton more than defendant was by law entitled to fix, demand, charge and receive, in this, that during all said times and dates herein named defendant had fixed, charged, demanded and received for the carriage of the same class of coal over its said line and over another part of its said road from its Station of Liberal and to another of its said Stations, viz., Granby, in said State, a distance of 77.14 miles, 50 cents per ton by the car load, while the distance from said Myrick to said Sedalia was only 57.21 miles for which said rate of 65 cents per ton for said carriage was fixed, charged, demanded and received of plaintiff as aforesaid; and the same was illegal and exceeded the amount the defendant was entitled to fix, charge, demand and receive for said shipments by the sum of $4,317 and — cents.

And the plaintiff avers that it is damaged and aggrieved by reason of said illegal freight charge in the sum of $4,317 and — cents: Wherefore, it prays judgment for the same and for said damages not exceeding $1,000 and for all other and general relief according to the Statute in such case made and provided.

Plaintiff for 47th cause of action avers that on October, 1879, the defendant was and has ever since been a railroad corporation duly organized under the law of said State and a common carrier for hire of freight and passengers between its Stations hereinafter named in said State.

That within five years last past and on the dates hereinafter named plaintiff produced and sold bituminous coal from its own mines near Myrick, one of defendant's Stations in said County, and that on the various dates named in Exhibit No. 47, and in the cars therein described by Number and Initial it shipped by defendant's road from said Myrick in the aggregate 62,719,800 pounds of its said coal in car load lots to the consignees named in said exhibit at Kansas City, another station on defendant's road.

Plaintiff avers that for the said carriage of said coal defendant fixed, charged, demanded and received of the plaintiff 55 cents per ton, an illegal freight rate, being 15 cents per ton more than defendant was by law entitled to fix, demand, charge and receive, in this, that during all said times and dates herein named defendant had fixed, charged, demanded and received for the carriage of the same class of coal over its said line and over another part of its said road from its Station of Worland and to another of its said Stations, viz., Nevada, in said State, a distance of 41.07 miles, 40 cents per ton by the car load, while the distance from said Myrick to said Kansas City was only 40.84 miles for which said rate of 55 cents per ton for said carriage was fixed, charged, demanded and received of plaintiff as aforesaid; and the same was illegal and exceeded the amount the defendant was entitled to fix, charge, demand and receive for said shipments by the sum of $4,703 and 98 cents.

And the plaintiff avers that it is damaged and aggrieved by reason of said illegal freight charge in the sum of $4,703 and 98 cents; Wherefore, it prays judgment for the same and for said damages not exceeding $1,000 and for all other and general relief according to the Statute in such case made and provided.